

**Oregon State Bar**  
**Meeting of the Board of Governors**  
September 11, 2015  
Oregon State Bar Center, Tigard, OR  
**Open Session Agenda**

*The Open Session Meeting of the Oregon State Bar Board of Governors will begin at 12:30pm on September 11, 2015.  
Items on the agenda will not necessarily be discussed in the order as shown.*

**Friday, September 11, 2015, 12:30pm**

**1. Call to Order / Finalization of Agenda**

**2. Report of Officers & Executive Staff**

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|----|---|--------|---------|
| A. | President's Report [Mr. Spier]                        | Inform | Exhibit |
| 1) | New E.D. Contract                                     | Action | Handout |
| 2) | President-elect 2016 Nominating Process               | Inform |         |
| B. | President-elect's Report [Mr. Heysell]                | Inform |         |
| C. | Executive Director's Report [Ms. Stevens]             | Inform | Exhibit |
| D. | Director of Regulatory Services [Ms. Evans]           | Inform | Exhibit |
| E. | Director of Diversity & Inclusion Report [Ms. Hyland] | Inform |         |
| F. | MBA Liaison Report [Ms. Kohlhoff]                     | Inform |         |
| G. | Oregon New Lawyers Division Report [Ms. Clevering]    | Inform | Exhibit |

**3. Professional Liability Fund [Ms. Bernick]**

- |    |  |        |         |
|----|--|--------|---------|
| A. | 2016 PLF Budget and Assessment                         | Action | Exhibit |
| B. | 2016 PLF Coverage Plans – Primary, Excess and Pro Bono | Action | Exhibit |
| C. | June 30, 2015 PLF Financial Statements                 | Inform | Exhibit |

**4. OSB Committees, Sections and Councils**

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|----|---|--------|---------|
| A. | MCLE Committee  |        |         |
| 1) | Accreditation criteria for child and elder abuse reporting programs | Action | Exhibit |
| 2) | Proposed Amendments: Program Accreditation Rules and Regulations    | Action | Exhibit |
| B. | Ethics Committee  |        |         |
| 1) | Ethics Opinions Revisions   | Action | Exhibit |

**5. BOG Committees, Special Committees, Task Forces and Study Groups**

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|----|--|--------|---------|
| A. | Appellate Screening Special Committee [Mr. Ross] |        |         |
| 1) | Review Process for Current Vacancies             | Inform |         |
| B. | Awards Special Committee [Mr. Spier]             |        |         |
| 1) | Annual Awards Selection                          | Action | Handout |
| C. | Board Development Committee [Ms. Matsumonji]     |        |         |
| 1) | PLF Board of Directors Appointments              | Action | Exhibit |
| 2) | Board of Bar Examiners Appointments              | Inform | Exhibit |

- D. Budget & Finance Committee [Ms. Kohlhoff]
  - 1) Financial Update Inform Exhibit
  - 2) 2016 Member Fee Discussion Inform
- E. Governance & Strategic Planning [Mr. Heysell]
  - 1) Review New Fee Dispute Resolution Rules Action Exhibit
- F. Public Affairs Committee [Mr. Prestwich]
  - 1) Legislative Interim Update Inform

**6. Other Items**

- A. Appointments to Bar Committees, Boards, Councils [Ms. Edwards] Action Exhibit
- B. Legal Opportunities Report [Ms. Wright] Inform Posted 9/9
- C. Report on *Relevant Lawyer* Publication, Ch 1 & 2. [Ms. Zinser] Inform
- D. Background on OSB Surveys [Ms. Pulju] Inform
- E. Selection of BOG Liaison to Board of Bar Examiners [Mr. Spier] Action Exhibit
- F. Members' Room Design [Ms. Stevens] Action Exhibit

**7. Consent Agenda**

- A. Approve Minutes of Prior BOG Meetings
  - 1) Regular Session June 26, 2015 Action Exhibit
  - 2) Special Open Session July 24, 2015 Action Exhibit

**8. Default Agenda**

- A. CSF Claims Financial Report and Awards Made Exhibit
- B. President's Correspondence Exhibit

**9. Closed Sessions – CLOSED Agenda**

- A. Executive Session (pursuant to ORS 192.660(1)(f) and (h)) – General Counsel/UPL Report

**10. Good of the Order (Non-Action Comments, Information and Notice of Need for Possible Future Board Action)**

- A. Correspondence
- B. Articles of Interest

## **Report of President**

Richard G. Spier

Oregon State Bar Board of Governors Meeting September 11, 2015

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| July 14, 2015      | House of Delegates regional meetings  |
| July 16, 2015      | Distribute paychecks to OSB employees   |
| July 17, 2015      | Speak at Judge McIntyre investiture, Eugene   |
| July 21, 2015      | Veterans & Military Law Section Executive Committee meeting   |
| July 21, 2015      | Meet with new BOG member and Sylvia Stevens   |
| July 23, 2015      | Meet with Chief Justice, Salem, with Ray Heysell, Sylvia Stevens, Susan Grabe, and Helen Hirschbiel                                     |
| July 24, 2015      | Committee and special BOG meetings  |
| August 7, 2015     | Speak at OLIO, Hood River   |
| August 12, 2015    | Labor & Employment Law Section Executive Committee meeting  |
| August 18, 2015    | Meet with Judge Adrienne Nelson, Sylvia Stevens, Helen Hirschbiel and MBA leadership re: visit of ABA President to Oregon, October 2015 |
| August 19, 2015    | Speak at Willamette College of Law orientation program for incoming 1L students   |
| September 9, 2015  | Constitutional Law Section Executive Committee meeting  |
| September 11, 2015 | Committee and BOG meetings  |

Report prepared August 20, 2015; engagements thereafter are as scheduled

# OREGON STATE BAR

## Board of Governors Agenda

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Meeting Date: September 11, 2015  
 From: Sylvia E. Stevens, Executive Director  
 Re: Operations and Activities Report

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### OSB Programs and Operations

| Department   |  |
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| <ul style="list-style-type: none"> <li>▪ <b>Accounting &amp; Finance/<br/>Facilities/IT<br/>(Rod Wegener)</b></li> </ul> | <p><i>Accounting</i><br/>           In coordination with Human Resources, we have fully implemented the new payroll system; all payroll transaction and time keeping now is performed electronically by staff. Much helpful payroll information is available to individual employees and management.</p> <p><i>IT</i></p> <ul style="list-style-type: none"> <li>▪ The department continues to balance day-to-day operations, project and task requests, and the AMS project. Staff are currently interviewing local IT service providers to audit the bar’s existing infrastructure and find backup support for critical IT functions.</li> <li>▪ The AMS implementation is in the final stages of the design phase. Final clarifications and corrections to the solution design documentation provided by Aptify’s project team are being made. The next steps include signing off on scope after reviewing estimates and the implementation statement of work.</li> </ul> <p><i>Facilities:</i></p> <ul style="list-style-type: none"> <li>▪ An agreement has been signed with Energy Trust of Oregon (ETO) and Graybar Electric to replace the parking lot lights with low energy LED lights. The estimated cost is \$13,594 and the bar is scheduled to receive a rebate of \$6,030 from ETO. The payback through energy savings is projected at just less than 4 years. Parkland Development (the building next door) also has executed an agreement with the same parties.</li> <li>▪ The bar’s newest tenant, the American Lung Association, moved in in early September. The lease is at \$23.00/s.f. for 63 months with an annual 3% escalator. The TI’s of approximately \$51,000 will be paid from the bar’s Landlord Contingency fund. With ALA’s move in the bar center is 100% occupied.</li> </ul> |
| <ul style="list-style-type: none"> <li>▪ <b>Communications &amp; Public</b></li> </ul>                                   | <p><i>Communications</i></p> <ul style="list-style-type: none"> <li>▪ OSB priority issues communicated through recent editions of the Bulletin include: ethical considerations in mentoring relationships; consideration of the Uniform Bar Exam; the proper use of interpreters and translators in the</li> </ul>   |

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| <p><b>Services (includes RIS and Creative Services) (Kay Pulju)</b></p>             | <p>justice system; the Magna Carta as an enduring symbol of the rule of law; protecting clients from scams and fraud; and establishing a work/life balance through the practice of mindfulness.</p> <ul style="list-style-type: none"> <li>▪ Communications staff produced electronic Bar News and BOG Updates newsletters, conducted multiple surveys and provided communications and marketing support for other bar programs, including CLE Seminars and Member Services.</li> <li>▪ The biennial revision process for our online public legal information library is underway. Highlights for this cycle include new information on cannabis law in Oregon and legal information for college students.</li> </ul> <p><i>Creative Services</i></p> <ul style="list-style-type: none"> <li>▪ Preparations for the fall CLE season are on course with increased target marketing online in BarBooks, the member dashboard and the OSB and CLE home page carousels, as well as the Bulletin and Bar News.</li> <li>▪ Progress on transitioning section websites to the OSB WordPress platform: The Business Law section site was launched in August (<a href="http://businesslaw.osbar.org">http://businesslaw.osbar.org</a>) and training was provided to their editor for ongoing maintenance. Draft sites for the Disability Law Section and the Estate Planning &amp; Administration Sections are under review by the sections, and the RELU and Administrative Law sections have requested new sites, which are currently under construction.</li> <li>▪ Staff are developing the new bar website that will be launched with the AMS/Aptify system in 2016, and will attend an Aptify User Conferences in the fall for guidance on integration of the new AMS and CMS systems with bar programs and services.</li> </ul> <p><i>Referral &amp; Information Services</i></p> <ul style="list-style-type: none"> <li>▪ Since the launch of its newly developed software, RIS has made more than 9,000 referrals in the new system with no issues. The transition to our own proprietary software, developed by the bar’s IT staff, will also save more than \$19,000 in licensing fees in 2015 alone.</li> <li>▪ LRS revenue is on track to exceed budget projections for the year. LRS has generated \$406,961 in revenue for the bar in the first 6 months of 2015, and \$1,600,000 since the percentage fee model started in October of 2012. This revenue represents over \$11,000,000 in legal fees that LRS attorneys have billed and collected from LRS-referred cases over the past three years.</li> <li>▪ With a new program year beginning September 1, staff are processing registrations for approximately 550 panelists. Registration fees generally produce around \$115,000 in revenue for the bar.</li> <li>▪ RIS continues to monitor a one-year pilot program for several new Modest Means Program panels. At the end of the program year RIS will report results to the PSAC and BOG.</li> </ul> |
| <ul style="list-style-type: none"> <li>▪ <b>CLE Seminars (Karen Lee)</b></li> </ul> | <ul style="list-style-type: none"> <li>▪ Beginning with fall seminars, CLE Seminars has expanded the New Lawyer registration rate to include all members of the ONLD. The department’s existing discount was limited to new Oregon attorneys within their first two years of practice. The change was made to encourage more new lawyers to</li> </ul>   |

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|   | <p>attend OSB programs. The ONLD leadership is very appreciative of the extended benefit.</p> <ul style="list-style-type: none"><li>▪ The department’s video replay program (physical replay sites) was retired July 31.</li><li>▪ The department sponsored three online replays of an elder abuse reporting seminar during the spring and summer. The department netted a little over \$3,000 for approximately four hours of staff time to set up and market the three replays.</li><li>▪ The first co-sponsored OSB Solo &amp; Small Firm Conference is scheduled for July 8-9, 2016, at the Riverhouse, in Bend.</li></ul>   |
| <ul style="list-style-type: none"><li>▪ <b>Diversity &amp; Inclusion (Mariann Hyland)</b></li></ul> | <ul style="list-style-type: none"><li>▪ The online version of the bar’s Diversity Story Wall was launched on July 8, 2015: <a href="https://storywall.osbar.org/">https://storywall.osbar.org/</a>.</li><li>▪ The OLIO Orientation held on August 7-9, 2015 in Hood River was a great success. A total of 57 students (1L-3L) attended this year, with 40 attorneys and 12 judges also participating. A total of 34 attorneys, in and out of the Hood River area, also attended our two free CLEs on Immigration 101 and Elder Abuse Reporting. OSB President Rich Spier presented welcoming remarks. Other BOG member volunteers and attendees were immediate past President Tom Kranovich, Ramon Pagan, Audrey Matsumonji, and Josh Ross. Keynote speakers included Attorney General Ellen Rosenblum, Judge Kenneth Walker, and attorney Lake Perriguy. In addition, we had 33 OLIO alumni attend our first OLIO Alumni Reunion event, held concurrently with this year’s Orientation.</li><li>▪ Jim Bailey will be presenting three Law School Study Skills Workshop for the Oregon law schools in late September/early October 2015.</li><li>▪ BOWLIO is scheduled for Saturday, November 7, 2015, in Portland at AMF Pro 300 Lanes.</li><li>▪ OSB D&amp;I Director Mariann Hyland and former OSB President Tom Kranovich held their first Community Outreach Stakeholder Meeting with leaders in the minority legal community on August 13, 2015 to explore bridging the gap between a demand for legal services in Oregon’s diverse communities and unemployed and under-employed attorneys.</li><li>▪ The PSU Explore the Law Program had its first Mentor Training Luncheon at PSU on August 26, 2015. PSU and D&amp;I recruited 14 attorney mentors from a variety of practice areas to assist PSU students in deciding whether to pursue a career in the law. Orientation with the lawyer mentors and PSU students was September 10, 2015.</li><li>▪ Chris Ling joined the Diversity &amp; Inclusion Department as D&amp;I Coordinator. He was invited to speak at Willamette University Asian Pacific American Law Students Association’s first fall meeting on September 8, 2015. He talked to the students, who include this year’s OLIO students, about the D&amp;I Program activities and benefits, and how to become involved in the Oregon legal community.</li><li>▪ The D&amp;I Program is in the process of planning the details for this year’s</li></ul> |

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|  | <p>Judicial Mentorship Program, which matches law students with judges from our state bench. Judicial mentors and their student mentees will be assigned in October 2015, prior to BOWLIO.</p>   |
| <p>▪ <b>General Counsel (includes CAO and MCLE) (Helen Hirschbiel)</b></p> | <ul style="list-style-type: none"> <li>▪ General Counsel has been working closely with the MCLE and IT Departments to streamline MCLE rules and regulations to make configuration and implementation of the new AMS simpler and the member experience with reporting MCLE compliance better.</li> <li>▪ General Counsel completed service on the Unbundled Legal Services UTCR Workgroup. The workgroup is making recommendations for amendments to the UTCR to make the provision of unbundled legal services to litigants in family law cases easier.</li> <li>▪ Amber Hollister, currently the OSB Deputy General Counsel, has accepted an offer to be the OSB General Counsel beginning January 1, 2016, when Helen Hirschbiel will begin serving as the new OSB Executive Director. We will begin recruiting for a new deputy general counsel in September 2015.</li> <li>▪ We have fully implemented the new bylaws relating to UPL and have been in communication with the Oregon Supreme Court General Counsel regarding whether additional changes should be made in light of the U.S. Supreme Court decision in <i>North Carolina Dental Board v. FTC</i>.</li> <li>▪ CLE season is ramping up. Client Assistance Office attorneys, as well as Deputy General Counsel and General Counsel have been providing elder abuse reporting and other ethics CLEs throughout the summer.</li> <li>▪ The Client Assistance Office has seen a drastic reduction in postage costs as a result of its move to paperless processing of complaints. They have received no negative feedback from either members or complainants in response to their new paperless office procedures.</li> </ul> |
| <p>▪ <b>Human Resources (Christine Kennedy)</b></p>                        | <ul style="list-style-type: none"> <li>▪ Recruitment Activities:             <ul style="list-style-type: none"> <li>✓ Hired Nikhil Chourey and Theodore Reuter as Assistant Disciplinary Counsel replacing Linn Davis who was promoted to CAO Manager and Mary Cooper who is retiring.</li> <li>✓ Promoted Amber Hollister to General Counsel effective 1/1/16; beginning the process to search for Amber’s replacement as Deputy General Counsel.</li> <li>✓ Brandi Norris was promoted to Regulatory Services Coordinator and Sergio Hernandez was promoted to Public Records Coordinator.</li> <li>✓ Gaby van Gemeren was hired to fill the vacated CLE Seminars Assistant position.</li> <li>✓ Angela McCracken was hired to fill the vacated Discipline Legal Secretary position.</li> <li>✓ Scott Sears was hired to fill the vacated part-time Facilities Assistant position.</li> <li>✓ Christopher Ling was hired to fill the vacated Diversity &amp; Inclusion</li> </ul> </li> </ul>  |

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|  | <p>Coordinator position.</p> <ul style="list-style-type: none"> <li>✓ Julia Art was hired to fill the vacated Production Artist position.</li> <li>✓ We continue active searches for replacements for a part-time RIS Assistant, a Receptionist, and a Legal Publications Attorney Editor.</li> <li>▪ We invited Rick Liebman, Mike Tedesco, and Kyle Abraham to speak to staff about PECBA: what it is, how it works, and what it might mean for staff.</li> <li>▪ Clarence Belnavis presented to all staff a mandatory training addressing harassment and discrimination.</li> <li>▪ Assisted with setup of new payroll system and training of staff.</li> <li>▪ Met with all managers and directors for mid-year performance reviews.</li> <li>▪ Assisted Rich Spier with distribution of paychecks to all staff.</li> </ul>   |
| <ul style="list-style-type: none"> <li>▪ <b>Legal Publications (Linda Kruschke)</b></li> </ul>   | <ul style="list-style-type: none"> <li>▪ The following have been posted to BarBooks™ since my last report:             <ul style="list-style-type: none"> <li>✓ Six chapters of <i>The Ethical Oregon Lawyer</i>.</li> <li>✓ Twenty reviewed or revised and two new <i>Uniform Civil Jury Instructions</i>.</li> <li>✓ Eleven more chapters of <i>Oregon Real Estate Deskbook</i>. (All are now posted).</li> </ul> </li> <li>▪ We completed preorder marketing for the <i>Oregon Real Estate Deskbook</i> and it is now available to order online for the full price. We also offered a special deal to authors.             <ul style="list-style-type: none"> <li>✓ Preorders, Standing orders, and Author orders to date = \$128,742</li> <li>✓ Budget = \$117,325</li> <li>✓ The final book will go to the printer mid-September.</li> </ul> </li> <li>▪ <i>Uniform Civil and Criminal Jury Instructions</i> (released in February) sales are tracking as expected:             <ul style="list-style-type: none"> <li>✓ <i>Civil</i>: YTD revenue=\$33,236; 2015 budget=\$39,450</li> <li>✓ <i>Criminal</i>: YTD revenue=\$16,197; 2015 budget=\$18,750</li> </ul> </li> <li>▪ Under our Lexis licensing agreement, we earned royalties of \$1,397 for the first half of 2015. Our Westlaw licensing agreement revenue for the first half of 2015 is \$1,979.93, more than anticipated.</li> <li>▪ We’ve started the hiring process to replace Ian Pisarcik, who resigned his position as Attorney Editor.</li> </ul> |
| <ul style="list-style-type: none"> <li>▪ <b>Legal Services Program (Judith Baker) (includes LRAP, Pro Bono and an OLF report)</b></li> </ul> | <p><i>Legal Services Program</i></p> <ul style="list-style-type: none"> <li>▪ The LSP Committee is reviewing the configuration of legal aid programs with an eye toward what is in the best interest of clients. For the purpose of the review the LSP Committee added four lawyers to assist with the charge. A subcommittee was formed to analyze data and make a recommendation to the full committee in September.</li> <li>▪ Staff has been investigating the ABA proposed nationwide online pro bono website and will present it to the OSB Pro Bono Committee and the BOG.</li> <li>▪ Staff is coordinating a Certified Pro Bono Program Roundtable discussion</li> </ul>  |



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|   | <p>about Pro Bono Across the Spectrum, scheduled for September 30.</p> <ul style="list-style-type: none"> <li>▪ Staff is preparing for the October 29 Pro Bono Fair, CLE, Awards Ceremony. Staff recently became involved in helping to prepare for ABA President Paulette Brown’s visit to Portland in late October, helping to ensure that President Brown has a pro bono opportunity.</li> </ul> <p><i>Oregon Law Foundation</i></p> <ul style="list-style-type: none"> <li>▪ The Oregon Law Foundation is revising its governing documents to include no longer being a member based organization, changing board term limits and adding two more public members. The OLF continues to work with banks to achieve the highest possible interest rate on IOLTA accounts.</li> </ul>  |
| <ul style="list-style-type: none"> <li>▪ <b>Media Relations (Kateri Walsh)</b></li> </ul> | <ul style="list-style-type: none"> <li>▪ Working with Multnomah County’s Court Design Team on a “media room” in the new courthouse and bringing comment and input from local media about what a modern courthouse might incorporate for high-profile media cases.</li> <li>▪ Leading a committee of the Bar Press Broadcasters Council drafting an amendment to UTCR 3.180 (cameras in the courtroom) to address modern technology such as cell phones, laptops, etc. A draft will be going out to all Presiding Judges in September for review.</li> <li>▪ Commencing planning for 2016 <i>Building a Culture of Dialogue</i> program between courts, prosecutors, defense attorneys, police and media. This year will add a second program, scaled down and video-taped so that program can be used as education beyond the usual “invitation only” participants in the annual event.</li> <li>▪ Facilitating discussion between the <i>Oregonian</i> and several parties who have had negative experiences with media in recent months. (Ask me for details if you need).</li> <li>▪ Helping each court draft handouts for media about their local court rules or standard practices regarding media access.</li> <li>▪ Managing the regular, ongoing coverage of roughly six current CAO and/or DCO cases.</li> </ul> |
| <ul style="list-style-type: none"> <li>▪ <b>Member Services (Dani Edwards)</b></li> </ul> | <ul style="list-style-type: none"> <li>▪ An election for the new out of state BOG position will be held this October in conjunction with the Region 5 and 6 election. Four candidates are running for the out of state position with practices in California, North Carolina, and Washington. A list of all the candidates is available at <a href="http://www.osbar.org/leadership/bog">http://www.osbar.org/leadership/bog</a>.</li> <li>▪ Board members and staff have meet with half of all bar sections to discuss the CLE program, fund balance, and website policy items. The remaining meetings are scheduled through October.</li> <li>▪ The volunteer recruitment process has come to an end. More than 250 members applied for service on a bar committee, council, or board. Appointments to these groups will take place during the October and</li> </ul>   |

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|  | <p>November Board Development Committee meetings.</p> <ul style="list-style-type: none"> <li>▪ The Board Development Committee will conduct interviews for next year’s BOG public member on September 28. The committee’s recommendation is expected to go to the full board during the October meeting.</li> <li>▪ The 2014 <u>committee</u> and <u>section</u> annual reports are available online.</li> </ul>  |
| <ul style="list-style-type: none"> <li>▪ <b>New Lawyer Mentoring (Kateri Walsh)</b></li> </ul> | <ul style="list-style-type: none"> <li>▪ Preparing for our annual <i>Movies &amp; Mentoring</i> at the Hollywood Theater Mon Nov. 9. Mark calendars - hope some BOG can join!</li> <li>▪ Drafting amendments to the Supreme Court rule to allow federal lawpractitioners (social security practitioners, etc) who are not OSB members to serve as mentors.</li> <li>▪ Drafting a new policy for law firms who have well-established internal mentoring programs which meet the requirements of the NLMP, to streamline their participation and certification of their new associates.</li> <li>▪ Commencing a partnership with OWLS to host a regular CLE Conference Call addressing NLMP curriculum items.</li> <li>▪ Implementing a Fall recruiting push in some areas where we are particularly in need of mentors.</li> <li>▪ Preparing for the October swearing-in ceremony, and welcoming our newest participants to the program.</li> <li>▪ Preparing our current participants for their December 31 deadline to complete the program.</li> </ul>  |
| <ul style="list-style-type: none"> <li>▪ <b>Public Affairs (Susan Grabe)</b></li> </ul>        | <ul style="list-style-type: none"> <li>▪ <i>Legislative Cycle and Budget:</i> The Public Affairs Department has begun preparation for the 2016 legislative cycle and budget. The move to Annual Sessions has changed timeframes, workflow and speed of response time. This has, in turn, required a corresponding shift in bar operations to ensure effective participation in the process.</li> <li>▪ <i>2015-17 Interim Session:</i> Public Affairs is already busy with Interim Session activities. We are preparing to reach out to bar groups about the short 2016 session, and developing a timeline for development of proposals for the 2017 long session. We are also providing support to several legislative workgroups on the following topics:             <ul style="list-style-type: none"> <li>✓ Advance Directives,</li> <li>✓ Probate Modernization,</li> <li>✓ Power of Attorney,</li> <li>✓ Digital Assets,</li> <li>✓ Election Law,</li> <li>✓ Uniform Collateral Consequences of Conviction Act,</li> <li>✓ Guardianship, Due Process and cost shifting in contested case hearings, and</li> <li>✓ Definition for elder abuse reporting.</li> </ul> </li> <li>▪ <i>Appellate Screening Committee:</i> PAD is working with the BOG Appellate Screening Committee on the Court of Appeals vacancies. The deadline to</li> </ul> |

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|   | <p>apply is September 11<sup>th</sup>. Interviews will likely be held in the middle of September at the bar center.</p> <ul style="list-style-type: none"> <li>▪ <i>2015 Oregon Legislation Highlights</i>: The 2015 Oregon Legislation Highlights publication is being compiled. It provides information about legislative changes in a variety of practice areas and offers practice tips to assist lawyers on changes that might impact their practice.</li> <li>▪ <i>Oregon eCourt</i>: We continue to work with the OSB/OJD eCourt Implementation Task Force to assist with the rollout and to develop new Uniform Trial Court Rules regarding Oregon eCourt. Mandatory eFiling for active members of the Oregon State Bar will be in place in all Oregon circuit courts by the fall of 2016. PAD is working to ensure outreach to and training opportunities for OSB members.</li> </ul>  |
| <ul style="list-style-type: none"> <li>▪ <b>Regulatory Services (Dawn Evans)</b></li> </ul> | <p><i>Admissions</i></p> <ul style="list-style-type: none"> <li>▪ The Admissions Department and the BBX were assisted by a number of Bar staff in proctoring the July Bar examination, held in Portland and, for some examinees, at the Bar Center. The BBX has completed grading the 398 exams, the lowest number for a July exam since 1989. Results will be released later in September. A new public member, Dr. Richard Kolbell, joined the Board at its August meeting. Members of the Board will participate in the October 1 swearing-in ceremony for new lawyers held at Willamette University.</li> </ul> <p><i>Disciplinary Counsel's Office</i></p> <ul style="list-style-type: none"> <li>▪ Three new employees have joined the office in recent weeks – Assistant Disciplinary Counsel Nik Chourey, Legal Secretary Angela McCracken, and Assistant Disciplinary Counsel Ted Reuter, making the office fully-staffed. Mr. Chourey has a strong civil litigation background, having worked in insurance defense for a period of years. Ms. McCracken has extensive experience as a legal secretary in California. Mr. Reuter comes to the Bar from managing a legal services office in Ontario, Oregon.</li> <li>▪ Disciplinary Counsel Dawn Evans will be speaking to the Oregon Municipal Judges Association on Thursday, September 17, and will join Mark Johnson-Roberts in presenting at the OLI’s Family Law Seminar on September 25.</li> </ul> <p><i>Regulatory Services</i></p> <ul style="list-style-type: none"> <li>▪ Both of the Regulatory Services positions have turned over in recent weeks. Brandi Norris now serves as Regulatory Services Coordinator, processing reinstatement applications and addressing status changes as Bar members transition between categories of membership (i.e., inactive to active). Sergio Hernandez, who formerly worked in the reception area, is Public Records Coordinator, responding to requests for Bar records.</li> </ul> |

**Executive Director’s Activities June 29 to September 10, 2015**

| <b>Date</b> | <b>Event</b>  |
|-------------|---|
| 7/1         | Discipline System Review Committee—Subcommittee meeting                 |
| 7/8         | Meet w/Health Law Section re: CLE changes                               |
| 7/8         | DSRC Subcommittee meeting   |
| 7/14        | Out of State and Region 5 HOD Meetings                                  |
| 7/15        | EDs Breakfast Group   |
| 7/15        | Meet w/Administrative Law Section re: CLE changes                       |
| 7/16        | Region 6 and Region 5 HOD Meetings                                      |
| 7/17        | Meet with Environmental & Natural Resources Section re: CLE changes     |
| 7/21        | Informal Orientation for Michael Levelle (with RGS)                     |
| 7/23        | Meet with Chief Justice   |
| 7/29-8/1    | NABE & NCBP Meetings—Chicago (also ABA Policy Implementation Committee) |
| 8/12        | Meet w/Labor & Employment Law Section re: CLE changes                   |
| 8/15        | Legal Ethics Committee Meeting (sub for Helen)                          |
| 8/18        | Meet w/Judge Nelson re: ABA Presidential Visit                          |
| 8/19        | EDs Breakfast Group   |
| 8/20-21     | PLF Board Meeting—Sunriver  |
| 8/24        | Discipline System Review Committee                                      |
| 8/25        | Lewis & Clark Law School Professionalism Orientation                    |
| 9/9         | Meet w/Litigation Section re: CLE changes                               |

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** September 1, 2015  
**From:** Dawn M. Evans, Disciplinary Counsel  
**Re:** Disciplinary/Regulatory Counsel's Status Report

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### 1. Decisions Received.

#### a. Supreme Court

Since the Board of Governors last met in June 2015, the Supreme Court took the following action in disciplinary matters:

- Issued an order in *In re Mark G. Obert*, accepting this Salem lawyer's stipulation to a 9-month suspension, all but 90 days stayed, 3-year probation.

#### b. Disciplinary Board

No appeal was filed in the following cases and the trial panel opinions are now final:

- *In re Justin E. Throne* of Klamath Falls (2-year suspension) became final on June 19, 2015; and
- *In re W. Blake Simms* of Tempe, Arizona (120-day suspension) became final on July 8, 2015.

Three Disciplinary Board trial panel opinions have been issued since June 2015:

- A trial panel recently issued an opinion in *In re Rick Sanai* of Lake Oswego (disbarment) in a reciprocal discipline matter concluding that Sanai received due process in the Washington proceeding for conduct that spanned many years and consisted of willfully disobeying court orders and rules, as well as bringing a large number of frivolous claims and motions in a variety of jurisdictions for purposes of harassment and delay; and
- A trial panel recently issued an opinion in *In re Diarmuid Yaphet Houston* of Portland (150-day suspension with formal reinstatement) for failing to keep a client reasonably informed of the status of their matter, failing to respond to requests from client, failing to account for retainer, failing to promptly return client's documents, failing to withdraw upon suspension, failing to give client notice of suspension, and failing to respond to lawful demand for information from a disciplinary authority; and

- A trial panel recently issued an opinion in *In re Robert H. Sheasby* of Bend (disbarment) for failing to provide diligent representation in that his client was unable to obtain patents over a 4-year period of time that Sheasby represented him, for failing to cooperate with SLAC, and for failing to respond to lawful demand for information from a disciplinary authority.

In addition to these trial panel opinions, the Disciplinary Board approved stipulations for discipline in: *In re Drew A. Humphrey* of Klamath Falls (reprimand), *In re Tami S. P. Beach* of Eugene (6-month suspension), *In re David R. Ambrose* of Portland (reprimand), *In re Garrett Maass* of Portland (reprimand), *In re Eric J. Fjelstad* of Gresham (reprimand), *In re James J. Kolstoe* of Eugene (reprimand), *In re William L. Tufts* of Eugene (120-day suspension), *In re John V. McVea* of Portland (6-month suspension), *In re Andrew J. Lopata* of Eugene (90-day suspension, all stayed, 2-year probation), and *In re Siovhan Sheridan* of Tucson, Arizona (60-day suspension, all stayed, 3-year probation).

The Disciplinary Board Chairperson approved BR 7.1 suspensions in *In re Michael Reuben Stedman* of Medford, *In re Scott P. Bowman* of Gladstone, *In re Eric Einhorn* of Hood River, and *In re Edward T. LeClaire* of Portland.

## **2. Decisions Pending.**

The following matters are pending before the Supreme Court:

*In re Rick Sanai* – reciprocal discipline matter referred to Disciplinary Board for hearing on defensive issues; trial panel opinion issued (disbarment); accused appealed.

*In re Robert Rosenthal* – BR 3.4 petition pending.

*In re James F. Little* – BR 3.1 petition pending; BR 3.2 petition pending; BR 3.4 petition pending.

*In re Zachary Wayne Light* – BR 3.4 petition pending.

*In re Eric J. Fjelstad* – reciprocal discipline matter pending.

*In re Dirk D. Sharp* – reciprocal discipline matter pending.

The following matters are under advisement before a trial panel of the Disciplinary Board:

None.

**3. Trials.**

The following matters are on our trial docket in coming weeks/months:

- In re Andy Millar* – September 21, 2015
- In re James Baker* – October 13-14, 2015
- In re Paul H. Krueger* – October 19-21, 2015
- In re G. Jefferson Campbell* – October 28-29, 2015
- In re David Brian Williamson* – November 3-4, 2015
- In re William Bryan Porter* – December 3-4, 2015

**4. Diversions.**

The SPRB approved the following diversion agreements since June 2015:

- In re Robert E. Repp* – July 22, 2015
- In re Erin Levine* – August 1, 2015
- In re Sara M. Winfield* – August 1, 2015
- In re Kandy K. Gies* – August 5, 2015
- In re Laurel Parrish Hook* – September 1, 2015

**5. Admonitions.**

The SPRB issued 10 letters of admonition in July and August 2015. The outcome in these matters is as follows:

- 5 lawyers have accepted their admonitions;
- 0 lawyers have rejected their admonitions;
- 0 lawyers have asked for reconsiderations;
- 5 lawyers have time in which to accept or reject their admonitions.

**6. New Matters.**

Below is a table of complaint numbers in 2015, compared to prior years, showing both complaints (first #) and the number of lawyers named in those complaints (second #):

| <b>MONTH</b>  | <b>2011</b>    | <b>2012</b>    | <b>2013</b>    | <b>2014</b>    | <b>2015</b>    |
|---------------|----------------|----------------|----------------|----------------|----------------|
| January       | 19/20          | 46/49          | 21/21          | 29/31          | 18/19          |
| February      | 35/36          | 27/27          | 23/23          | 24/25          | 28/28          |
| March         | 21/25          | 38/39          | 30/30          | 41/45          | 22/22          |
| April         | 40/42          | 35/38          | 42/43          | 45/47          | 17/17          |
| May           | 143/146*       | 19/20          | 37/37          | 23/24          | 24/24          |
| June          | 20/20          | 39/40          | 31/31          | 23/24          | 31/31          |
| July          | 27/28          | 22/22          | 28/30          | 43/44          | 27/27          |
| August        | 22/23          | 35/35          | 33/36          | 19/21          | 28/29          |
| September     | 29/29          | 22/22          | 26/27          | 24/24          |                |
| October       | 22/23          | 23/23          | 26/26          | 25/25          |                |
| November      | 27/27          | 18/18          | 25/26          | 19/19          |                |
| December      | 39/40          | 26/26          | 19/19          | 21/23          |                |
| <b>TOTALS</b> | <b>444/459</b> | <b>350/359</b> | <b>341/349</b> | <b>336/352</b> | <b>195/197</b> |

\* = includes IOLTA compliance matters

As of September 1, 2015, there were 143 new matters awaiting disposition by Disciplinary Counsel staff or the SPRB. Of these matters, 48% are less than three months old, 16% are three to six months old, and 36% are more than six months old. Fourteen of these matters were on the SPRB agenda in August. Staff continues its focus on disposing of oldest cases, with keeping abreast of new matters.

**7. Reinstatements.**

Since the last board meeting, there are no reinstatements ready for board action.

**8. Staff Outreach.**

Amber Bevacqua-Lynott served as a panelist, discussing direct and cross-examination of expert witnesses, during the July 29-August 1 National Organization of Bar Counsel Annual Meeting, held in Chicago. At the same conference, Dawn Evans participated as a panelist, discussing developing case law and current trends in the handling of disciplinary cases against prosecutors.

DME/rh



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** August 26, 2015  
**From:** Karen Clevering, Oregon New Lawyers Division Chair  
**Re:** ONLD Report

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The following is a list of the activities and events the ONLD conducted since the last BOG meeting:

- The CLE Subcommittee held three brown bag CLE programs in Portland focusing on family law, unlawful trade practices act, and ORS 20.080 claims.
- The Member Services Subcommittee co-sponsored a social with OGALLA at Rontoms in July and an August social co-sponsored with OC-NBA at Olive or Twist in Portland. A sunset cruise was held in August on the Crystal Dolphin. The cruise departed from Portland and allowed the 100 participants an opportunity for extended networking in a beautiful and unusual setting. Many law students were also in attendance, learning about ONLD and honing their networking skills. Justice Kistler and Judge Greenlick were honored guests. BOG member Vanessa Nordyke also attended.
- The Pro Bono subcommittee is expanding its established Pro Bono Celebration, held in Portland the last week of October, by planning a satellite event in Bend to be held at the same time.
- The ONLD was honored with the second place ABA Young Lawyers Division Member Services Award for the creation of the Student Loan Repayment Resource Page.
- The ONLD presented their ABA Young Lawyers Division resolution during the Annual Meeting Assembly. The proposal was heard and then tabled due to discussion around this issue at the larger ABA level. ONLD Region Representative Jennifer Nicholls presented on behalf of ONLD. Historically few region affiliates, such as ONLD, have proposed resolutions, and ONLD was praised for its effort in bringing this to the attention of the YLD and collaborating with other YLD subcommittees and leadership.
- Several members of the ONLD Executive Committee participated at the OLIO Orientation in Hood River this year. Kaori Eder, ONLD Treasurer, participated in a panel discussion on networking, Ben Eder, Past-Chair, was available as a resource to the students, and Cassie Jones presented an Elder Abuse CLE for attorneys before the Judges reception. Mae Lee Browning, the subcommittee chair of ONLD's Member Services and Satisfaction Committee, also played a large role in the planning of OLIO. Mae Lee is ONLD D&I Liaison and an alumnae of OLIO. The ONLD Executive Committee is honored to have a larger role in the orientation this year and to strengthen its relationship with the Diversity and Inclusion Department and the Advisory Committee on Diversity and Inclusion.

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- A nominating committee was created to develop the slate for 2016. Five seats on the executive committee are up for election this year, two member at large seats and positions representing regions 1, 2, and 6.
  - The Executive Committee created a special subcommittee to consider areas for ONLD involvement in promoting rural area new lawyer practices. This subcommittee was spearheaded by Region Rep Jennifer Nicholls who attended the ABA YLD Annual Meeting. At the meeting, Jenn met with other YLD leaders and learned about programming on similar issues in other regions.
  - The Executive Committee is evaluating the ONLD awards process and qualifications before launching an open call for nominations this year. Under consideration is the creation of a new award to honor a member of the ONLD who is dedicated to advancing the OSB's diversity values.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** August 24, 2015  
**From:** Carol J. Bernick, PLF CEO  
**Re:** 2016 PLF Assessment and Budget

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### **Action Recommended**

Approve the 2016 Budget and Assessment.

### **Background**

On an annual basis, the Board of Governors approves the PLF budget and assessment for the coming year. The Board of Directors proposes that the assessment remain at \$3,500 (unchanged from 2015). The attached materials contain the proposed budget and recommendations concerning the assessment.

The highlights of the budget include a 3% salary pool and a \$200,000 contribution to the OSB for BarBooks. The overall increase to the 2016 budget is 2.59 percent higher than the 2015 budget. The main reasons for the increases are the 3% salary increase and related benefits costs, increased costs associated with overhauling and promoting the Excess Plan and employee training and travel.

Attachments

August 12, 2015

To: PLF Finance Committee (Dennis Black, Chair; Tim Martinez, Ira Zarov) and PLF Board of Directors

From: Carol J. Bernick, Chief Executive Officer  
Betty Lou Morrow, Chief Financial Officer

Re: 2016 PLF Budget and 2016 PLF Primary Assessment

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### **I. Recommended Action**

We recommend that the Finance Committee make the following recommendations to the PLF Board of Directors:

1. Approve the 2016 PLF budget as attached.
2. Recommend to the Board of Governors that the 2016 PLF Primary Program assessment remain at \$3,500, which is the same as it has been for the past five years.

### **II. Executive Summary**

1. Both the Executive Director of the Bar and we recommend a 3.0% increase to the salary pool. We are also recommending a 0.7% increase for individual salary reclassifications. Medical benefits are projected to increase in 2016 by an approximate 5%.
2. Loss Prevention had a retirement in 2015 in addition to .5FTE new hire. In 2015 the Claims department replaced a claims secretary who retired in 2014. Accounting and Administration remained at the same FTE as 2015.
3. The actuarial rate study estimates a cost of \$2,730 per lawyer for new 2016 claims, remaining the same from 2015. As in the past, this budget includes a factor of \$150 per attorney for adverse development of pending claims; and a margin of \$573 per attorney to cover unfunded operations.

### **III. 2016 PLF Budget**

#### **Number of Covered Attorneys**

We have provided the number of covered attorneys by period for both the Primary and Excess Programs. (The figures are found on pages 1 and 8 of the budget document.) These statistics illustrate the changes in the number of lawyers covered by each program and facilitate period-to-period comparisons.

For the Primary Program, new attorneys paying reduced primary assessments and lawyers covered for portions of the year have been combined into "full pay" attorneys. We project 6,950 full-pay attorneys for 2016. Over the five years ending 2014, the average annual growth of full-pay attorneys was .92 percent. For 2015, we are projecting a 2.1% decrease in the number of "full pay" attorneys from 2015 budget. The addition of a third year of new attorney discounts contributes to this decrease. Nonetheless, we have chosen to use a flat growth rate (the same 6950 full-pay attorneys) for our 2016 budget.

Although the Excess Program covers firms, the budget lists the total number of attorneys covered by the Excess Program. Participation in the Excess Program has declined since 2012, primarily because of competition from commercial carriers. Covered attorneys at Excess dropped 5.6% from 2012 to 2013; 4.5% 2013 to 2014; and a 4.2% year to date decline from 2014 to 2015. However the 2016 plan year will mark the introduction of factor based underwriting. It is difficult to accurately predict how this will impact the total premium for 2016. Therefore we are forecasting the number of covered attorneys and premiums will remain flat from 2015. We recognize that some firms will drop coverage as their premiums increase to match their risk profile. However through increased marketing (both general and targeted) we are forecasting adding new firms equal to the rate at which we may lose them.

#### **Full-time Employee Statistics (Staff Positions)**

We have included "full-time equivalent" or FTE statistics to show PLF staffing levels from year to year. FTE statistics are given for each department on their operating expense schedule. The following table shows positions by department. Each department is indicated net of Excess staff allocations (explained below):

|                                 | <b><u>2015 Projections</u></b> | <b><u>2016 Budget</u></b> |
|---------------------------------|--------------------------------|---------------------------|
| Administration                  | 6.92 FTE                       | 6.92 FTE                  |
| Claims                          | 19.81 FTE                      | 19.81 FTE                 |
| Loss Prevention (includes OAAP) | 14.05 FTE                      | 14.05 FTE                 |
| Accounting                      | 7.05 FTE                       | 7.05 FTE                  |
| Excess Allocations              | <u>3.60 FTE</u>                | <u>3.60 FTE</u>           |
| <b>Total</b>                    | <b>51.43 FTE</b>               | <b>51.43 FTE</b>          |

### **Allocation of Costs between the Excess and Primary Programs**

In 1991, the PLF established an optional underwritten plan to provide excess coverage above the existing mandatory plan. There is separate accounting for Excess Program assets, liabilities, revenues and expenses. The Excess Program reimburses the Primary Program for services so that the Primary Program does not subsidize the cost of the Excess Program. A portion of Primary Program salary, benefits, and other operating costs are allocated to the Excess Program. Salary and benefit allocations are based on an annual review of the time PLF staff spends on Excess Program activities. These allocations are reviewed and adjusted each year. The Excess Program also pays for some direct costs, including printing and reinsurance travel.

### **Primary Program Revenue**

Projected assessment revenue for 2016 is based upon the \$3,500 basic assessment paid by an estimated 6950 attorneys.

Investment returns have fallen short of forecasts for the first six months of 2015. The average annual rate of return for 2015 is projected to be approximately 3.42% versus the budgeted 4.6%. Investment results have been volatile in 2015 thus far. For the 2016 budget we have forecast an individual rate for each fund using a 3-10 period trailing return, depending on the information available. This has provided an overall budgeted return for 2016 of 4.96%. Again, RVK and the Investment Committee have been included in discussion about an appropriate rate of return for 2016. RVK feels that the 4.96% rate is a conservative, but appropriate forecast rate.

### **Primary Program Claims Expense**

By far, the largest cost category for the PLF is claim costs for indemnity and defense. Since claims often don't resolve quickly, these costs are paid over several years after the claim is first made. The ongoing calculation of estimated claim costs, along with investment results are the major factors in determining the Primary Program's positive/negative in-year net position.

For any given year, financial statement claims expense includes two factors – (1) the cost of new claims and (2) any additional upward (or downward) adjustments to the estimate of claims liabilities reflecting positive or adverse claims development for those pending at the beginning of the year. Factor 1 (new claims) is much larger and much more important than factor 2. However, problems would develop if the effects of factor 2 were never considered, particularly if there were consistent patterns of adverse claims development

Our projections of claim costs for 2015 include the actual claim count of 422 claims at June 30, 2015 valued at \$21,000 per new claim, in addition to 430 claims for the final six months of 2015<sup>1</sup> (6950 covered parties with a claims frequency of 12.25%) valued at \$22,000 per new claim. The

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<sup>1</sup> Although we have budgeted 885 new claims for 2015, as of August 10, 2015 we are tracking at 815.

\$21,000 cost per claim level increased to \$22,000 at the recommendation of the PLF actuaries. The \$150 per attorney factor for adverse claims developments will remain as budgeted for 2015. This is a conservative estimate as the June 30, 2015 correction was nearly \$1 million to accommodate worse than expected indemnity claims development. We believe there will be an offsetting correction in the second half of 2015. However, we are leaving the estimates as indicated because of the unpredictable nature of claims development.

Primary Program new claims expense for 2016 was based on figures calculated from the actuarial rate study. The study assumed a frequency rate of 11.83% for 2015 claims. Because this results in an annual claim count much lower than what we have seen the last several years, we are assuming the frequency (claim) rate will increase somewhat as 2015 progresses so we have used a frequency level of 12.00 for 2016 claims. Therefore, 6,950 attorneys with a 12% claims frequency equates to 834 claims. When these claims are multiplied by the average cost of claims, the total claims liability for 2016 is \$18,348,000.

We will continue to use a factor of \$150 per attorney to cover adverse development of pending claims. If the claims do not develop adversely, this margin could offset negative economic events, or help the PLF reach the net position goal. The pending claims budget for adverse development is equal to \$1,042,000 (\$150 times the estimated 6,950 full pay attorneys).

### **Salary Pool for 2016**

The total dollar amount that is available for staff salary increases in a given year is calculated by multiplying the salary pool percentage increase by the current employee salary levels. The salary pool is the only source available for cost of living *and* merit increases.

In consultation with Sylvia Stevens, a three percent cost of living increase is recommended for 2016. The salary pool also includes a 0.7% management tool for individual merit increases and reclassifications. The bulk of the salary reclassification amount reflects either the reclassification of relatively recently hired employees or addresses an historical lack of parity between the salaries of employees in positions with equivalent responsibilities. (Exempt positions are generally professional positions and are not subject to wage and hour requirements.) Salaries for entry level hires of exempt positions are significantly lower than experienced staff. As new staff members become proficient, they are reclassified and their salaries are adjusted appropriately. As the Board is aware, several new claims attorneys have been hired in recent years. The major reclassification usually occurs after approximately three years, although the process of salary adjustment often occurs over a longer period.

As a point of reference, one percent in the salary pool represents approximately \$44,000 in PLF salary expense and \$16,000 in PLF benefit costs. The total cost of the 3.7% salary pool is slightly more than one half of one percent of total expenses (0.56%).

### **Benefit Expense**

The employer cost of PERS and Medical / Dental insurance are the two major cost drivers for PLF benefits.

The employer contribution rates for PERS have both increased and decreased for the biennium beginning July 2015. The rates for Tier 1 and 2 employees will increase from 17.66% to 20.51% For OPSRP employees the rates will decrease from 14.84% down to 14.01%. In 2016 the PLF will have 11 employees in Tier 1 or 2; and 43 employees in the OPSRP plan.

Unlike most state and local employers, the PLF does not “pick up” the employee contribution to PERS. PLF employees have their six percent employee contribution to PERS deducted from their salaries.

The PLF covers the cost of medical and dental insurance for PLF employees. PLF employees pay about fifty percent of the additional cost of providing medical and dental insurance to dependents.

### **Capital Budget Items**

The major capital purchases in 2016 will be new servers for our IT infrastructure and new computers for most staff.

There is a three year plan laid out to expand the existing infrastructure creating efficiencies in our data processing and also creating heightened security and crash resistance. The first of the three years was 2014. Including 2015, all IT infrastructure purchases have been made as scheduled. Most staff will receive a new desktop computer, again in keeping with a five year plan created by the IT department in 2014.

### **Other Primary Operating Expenses with Changes from 2015 +/- 10%**

**Professional Services** have decreased over projected 2015 by about 12%. The majority of this decrease is due to attorney and professional fees (i.e. for website development) from 2015 that will not be incurred in 2016.

**Auto, Travel, and Training** are higher due to increased budgets for the promotion of the PLF generally and the Excess program specifically. Additionally the general market cost of travel is expected to increase.

**Loss Prevention Programs** have increases due to recent hires with accompanying training and travel budgets; the production of two additional handbooks; lease increases; and general expense increases.

**Defense Panel Program** happens only bi-annually, hence no budget for 2016.



## **General Information**

**OSB Bar Books** includes a \$200,000 contribution to the OSB Bar Books. The PLF Board of Directors believes there is loss prevention value in free access for lawyers in Oregon to Bar Books via the internet. The expectation is this access has the potential to reduce future claims.

**Contingency** for 2016 has been set at 1.5%. For many years, the PLF Primary Program has included a contingency budget item. The contingency amount has usually been set between two and four percentage of operating costs. However, the contingency fund has not been accessed in either 2013 or 2014, hence we are decreasing the contingency to the stated level of 1.5%.

## **Total Operating Expenses and the Assessment Contribution to Operating Expenses**

Page one of the budget shows 2015 projected Primary Program operating costs to be 1.2% lower than the 2015 budget amount.

The 2016 Primary Program operating budget is 3.9% percent higher than the 2015 projections and 2.6% percent higher than the 2015 budget. The main reasons for the increases are the 3% salary increase and related benefits costs; increased costs associated with PLF primary and excess program promotion; and increased staff training.

## **Excess Program Budget**

Participation in the Excess Program has declined since 2011 because of competition from commercial carriers. Staff has worked with AON and the reinsurers to create a more competitive premium structure as well as mining additional claims data for more meaningful analysis by both the PLF and the reinsurers. The results of this updated premium structure will become more apparent through the 2016 plan year underwriting process. Because the impact is still unknown, we are budgeting for a flat increase to premiums for 2016.

The major revenue item for the Excess Program is ceding commissions. These commissions represent the portion of the excess premium that the PLF retains. The commissions are based upon a percentage of the premium charged, with commissions varying depending on the coverage limits. Most of the excess premium is turned over to reinsurers who cover the costs of excess claims. We currently project ceding commission of \$762,000 for 2016. This represents an expectation of the commission remaining flat from expected 2015 levels.

After three or four years from the start of a given plan year, the two reinsurance treaties covering the first \$5 million of coverage provide for profit commissions if excess claim payments are low. If there are subsequent adverse developments, prior profit commissions are returned to the reinsurance companies. In recent years, excess claims have increased and it is quite difficult to predict profit commissions in advance. Actual profit commissions have proven to be rather small. As a result, no profit commissions have been included in the 2015 projections or 2016 budget.

Excess investment earnings are calculated using a formula that allocates investment revenue based on contribution to cash flow from the Excess program.

The major expenses for the Excess Program are salary, benefits, and operations allocations from the Primary Program.

#### **IV. Actuarial Rate Study for 2016**

The actuaries review claims liabilities twice a year, at the end of June and December. They also prepare an annual rate study to assist the Board of Directors in setting the assessment. The attached rate study focuses on the estimate of 2016 average claim cost per attorney. It relies heavily on the analysis contained in the actuaries' claim liability study as of June 30, 2015. The rate study calculates only the cost of new 2016 claims. It does not consider adjustments to pending claims, investment results, or administrative operating costs.

The actuaries estimate the 2016 claim cost per attorney using two different methods. The first method (shown on Exhibit 1) uses regression analysis to determine the trends in the cost of claims. Regression analysis is a statistical technique used to fit a straight line to a number of points on a graph. It is very difficult to choose an appropriate trend because the small amount and volatility of data, and different ranges of PLF claim years produce very different trend numbers. The selection of the starting and ending points is very significant. For the PLF, including a low claim starting point such as 1987 or a very high claim point such as 2000 skews the straight line significantly up or down. Because of these problems, the actuaries do not favor using this technique to predict future claim costs.

The second method (Exhibit 2) involves selection of expected claim frequency and claim severity (average cost). Claims frequency is defined as the number of claims divided by the number of full pay attorneys. For the indicated amount the actuaries have used a 2016 claims frequency rate of 13 percent and \$21,000 as the average cost per claim (severity), identical in both aspects to 2015. The actuaries prefer the result found with this second method. Their indicated average claim cost is \$2,730 per attorney. This amount would only cover the estimated funds needed for 2016 new claims.

It is necessary to calculate a provision for operating expenses not covered by non-assessment revenue. As can be seen in the budget, the estimate of non-assessment revenue does not cover the budget for operating expenses. The 2016 shortfall is about \$573 per lawyer, down from \$586 in 2015. The actuaries discuss the possibility of having a margin (additional amount) in the calculated assessment. On pages 8 of their report, the actuaries list pros and cons for having a margin in the assessment.

#### **V. Staff Assessment Recommendation**

The operating margin of \$573 per lawyer, in addition to the claim cost per attorney of \$2,730, would achieve an assessment of \$3,303. We feel that it is appropriate to include an additional factor of \$150 per attorney for adverse development of pending claims. This allows for a budget of about

\$1.04 million for adverse development of pending claims. An assessment of \$3,500 would allow a projected budget profit of about \$952,044.

Given the factors discussed above, the PLF staff feels that the current Primary Program assessment should be maintained for the remainder of 2015. Additionally, we recommend setting the 2016 Primary Program assessment at \$3,500.

The Finance Committee will discuss the actuarial report during its telephone conference meeting at 11:00 a.m. on August 12, 2015 and prepare recommendations for the Board of Directors. The full Board of Directors will then act upon the committee's recommendations at their board meeting on August 20, 2015.

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET**  
Presented to PLF Board of Directors on August 20, 2015

|                              | <u>2013<br/>ACTUAL</u> | <u>2014<br/>ACTUAL</u> | <u>2015<br/>BUDGET</u> | <u>2015<br/>PROJECTIONS</u> | <u>2016<br/>BUDGET</u> |
|------------------------------|------------------------|------------------------|------------------------|-----------------------------|------------------------|
| <b><u>Revenue</u></b>        |                        |                        |                        |                             |                        |
| Assessments                  | \$25,042,533           | \$24,668,300           | \$24,867,500           | \$24,325,465                | \$24,325,000           |
| Installment Service Charge   | 391,097                | 378,008                | 335,000                | 391,000                     | 400,000                |
| Investments and Other        | <u>4,364,988</u>       | <u>2,418,326</u>       | <u>2,472,882</u>       | <u>2,171,405</u>            | <u>3,347,495</u>       |
| Total Revenue                | <u>\$29,798,618</u>    | <u>\$27,464,633</u>    | <u>\$27,675,382</u>    | <u>\$26,887,870</u>         | <u>\$28,072,495</u>    |
| <b><u>Expenses</u></b>       |                        |                        |                        |                             |                        |
| Provision for Claims         |                        |                        |                        |                             |                        |
| New Claims                   | \$17,427,049           | \$19,595,940           | \$18,576,023           | \$18,322,000                | \$18,348,000           |
| Pending Claims               | <u>\$664,998</u>       | <u>(\$987,534)</u>     | <u>\$1,065,750</u>     | <u>\$1,042,500</u>          | <u>\$1,042,500</u>     |
| Total Provision for Claims   | <u>\$18,092,047</u>    | <u>\$18,608,406</u>    | <u>\$19,641,773</u>    | <u>\$19,364,500</u>         | <u>\$19,390,500</u>    |
| Expense from Operations      |                        |                        |                        |                             |                        |
| Administration               | \$2,348,769            | \$2,348,769            | \$2,565,414            | \$2,633,503                 | \$2,641,457            |
| Accounting                   | 805,336                | 805,336                | 801,989                | 758,479                     | 856,619                |
| Loss Prevention              | 2,016,547              | 2,016,547              | 2,234,762              | 2,123,477                   | 2,244,500              |
| Claims                       | <u>2,488,569</u>       | <u>2,488,569</u>       | <u>2,684,938</u>       | <u>2,669,255</u>            | <u>2,759,324</u>       |
| Total Operating Expense      | \$7,659,221            | \$7,659,221            | \$8,287,103            | \$8,184,715                 | \$8,501,900            |
| Contingency                  | 0                      | 0                      | 248,613                | 0                           | 127,529                |
| Depreciation                 | 166,575                | 164,678                | 169,800                | 156,859                     | 189,540                |
| Allocated to Excess Program  | <u>(1,135,160)</u>     | <u>(1,145,155)</u>     | <u>(1,008,049)</u>     | <u>(1,026,172)</u>          | <u>(1,089,018)</u>     |
| Total Expenses               | <u>\$24,782,683</u>    | <u>\$25,287,150</u>    | <u>\$27,339,240</u>    | <u>\$26,679,903</u>         | <u>\$27,120,451</u>    |
| Net Income (Loss)            | <u>\$5,015,935</u>     | <u>\$2,177,484</u>     | <u>\$336,142</u>       | <u>\$207,967</u>            | <u>\$952,044</u>       |
| Number of Full Pay Attorneys | 7,093                  | 7,104                  | 7,105                  | 6,950                       | 6,950                  |

**CHANGE IN OPERATING EXPENSES:**

Increase from 2015 Budget 2.59%

Increase from 2015 Projections 3.88%

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
CONDENSED STATEMENT OF OPERATING EXPENSE  
Presented to PLF Board of Directors on August 20, 2015**

|                                       | <u>2013<br/>ACTUAL</u>   | <u>2014<br/>BUDGET</u>   | <u>2015<br/>BUDGET</u> | <u>2015<br/>PROJECTIONS</u> | <u>2016<br/>BUDGET</u>   |
|---------------------------------------|--------------------------|--------------------------|------------------------|-----------------------------|--------------------------|
| <b><u>Expenses</u></b>                |                          |                          |                        |                             |                          |
| Salaries                              | \$4,145,086              | \$4,189,074              | \$4,387,818            | \$4,392,352                 | \$4,589,868              |
| Benefits and Payroll Taxes            | 1,457,187                | 1,486,255                | 1,653,606              | 1,540,419                   | 1,675,126                |
| Professional Services                 | 331,128                  | 325,775                  | 381,792                | 431,900                     | 380,792                  |
| Auto, Travel & Training               | 92,557                   | 109,931                  | 151,450                | 134,200                     | 168,900                  |
| Office Rent                           | 521,138                  | 512,379                  | 520,065                | 512,379                     | 527,865                  |
| Office Expense                        | 133,569                  | 155,121                  | 157,850                | 161,250                     | 171,050                  |
| Telephone (Administration)            | 48,675                   | 49,326                   | 49,560                 | 51,000                      | 51,500                   |
| L P Programs                          | 373,908                  | 483,532                  | 488,894                | 446,665                     | 503,906                  |
| OSB Bar Books                         | 200,000                  | 200,000                  | 200,000                | 200,000                     | 200,000                  |
| Defense Panel Program                 | 9,970                    | 1,915                    | 64,422                 | 67,500                      | 0                        |
| Insurance                             | 71,471                   | 38,344                   | 41,894                 | 42,000                      | 41,894                   |
| Library                               | 32,659                   | 31,741                   | 39,000                 | 29,500                      | 31,500                   |
| Memberships & Subscriptions           | 21,458                   | 22,469                   | 28,000                 | 35,000                      | 36,500                   |
| Interest & Bank Charges               | 5,213                    | 56,088                   | 122,752                | 114,500                     | 123,000                  |
| <br>Total Operating Expenses          | <br><u>\$7,444,018</u>   | <br><u>\$7,661,949</u>   | <br><u>\$8,287,103</u> | <br><u>\$8,158,665</u>      | <br><u>\$8,501,900</u>   |
| <br>Allocated to Excess Program       | <br><u>(\$1,105,104)</u> | <br><u>(\$1,120,789)</u> | <br><u>(\$987,350)</u> | <br><u>(\$1,001,806)</u>    | <br><u>(\$1,064,814)</u> |
| <br><br>Full Time Employees           | <br><br>43.88            | <br><br>49.53            | <br><br>51.28          | <br><br>51.43               | <br><br>51.43            |
| <br><br>Number of Full Pay Attorneys  | <br><br>7,093            | <br><br>7,104            | <br><br>7,105          | <br><br>6,950               | <br><br>6,950            |
| <br><br>Non-personnel Expenses        | <br><br>\$1,841,746      | <br><br>\$1,986,620      | <br><br>\$2,245,679    | <br><br>\$2,225,894         | <br><br>\$2,236,906      |
| Allocated to Excess Program           | (\$278,874)              | (\$270,406)              | (\$270,823)            | (\$270,406)                 | (\$282,589)              |
| Total Non-personnel Expenses          | <u>1,562,872</u>         | <u>1,716,214</u>         | <u>1,974,856</u>       | <u>1,955,488</u>            | <u>1,954,317</u>         |
| <br><br>CHANGE IN OPERATING EXPENSES: |                          |                          |                        |                             |                          |
| Increase from 2015 Budget             |                          | 2.59%                    |                        |                             |                          |
| Increase from 2015 Projections        |                          | 4.21%                    |                        |                             |                          |

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
ADMINISTRATION**

Presented to PLF Board of Directors on August 20, 2015

|                                      | <u>2013</u><br><u>ACTUAL</u> | <u>2014</u><br><u>ACTUAL</u> | <u>2015</u><br><u>BUDGET</u> | <u>2015</u><br><u>PROJECTIONS</u> | <u>2016</u><br><u>BUDGET</u> |
|--------------------------------------|------------------------------|------------------------------|------------------------------|-----------------------------------|------------------------------|
| <b><u>Expenses</u></b>               |                              |                              |                              |                                   |                              |
| Salaries                             | \$641,274                    | \$684,773                    | \$728,240                    | \$729,415                         | \$749,009                    |
| Benefits and Payroll Taxes           | 238,566                      | 233,366                      | 261,411                      | 253,959                           | 262,448                      |
| Staff Travel                         | 21,363                       | 37,354                       | 23,050                       | 41,100                            | 46,000                       |
| Board of Directors Travel            | 35,514                       | 35,244                       | 46,150                       | 44,500                            | 48,650                       |
| Training                             | 8,947                        | 13,651                       | 12,000                       | 12,000                            | 12,000                       |
| Investment Services                  | 28,018                       | 28,095                       | 40,000                       | 38,500                            | 40,000                       |
| Legal Services                       | 13,738                       | 11,461                       | 10,000                       | 20,000                            | 10,000                       |
| Actuarial Services                   | 19,731                       | 24,209                       | 29,300                       | 33,000                            | 34,300                       |
| Information Services                 | 136,221                      | 83,788                       | 111,000                      | 82,000                            | 96,000                       |
| Electronic Record Scanning           | 47,086                       | 44,859                       | 65,000                       | 60,000                            | 65,000                       |
| Other Professional Services          | 63,734                       | 110,564                      | 100,492                      | 175,800                           | 112,492                      |
| OSB Bar Books                        | 200,000                      | 200,000                      | 200,000                      | 200,000                           | 200,000                      |
| Office Rent                          | 521,138                      | 512,379                      | 520,065                      | 512,379                           | 527,865                      |
| Equipment Rent & Maint.              | 38,672                       | 45,047                       | 48,000                       | 49,500                            | 53,000                       |
| Dues and Memberships                 | 21,458                       | 22,469                       | 28,000                       | 35,000                            | 36,500                       |
| Office Supplies                      | 51,661                       | 70,597                       | 70,000                       | 67,000                            | 69,000                       |
| Insurance                            | 71,471                       | 38,344                       | 41,894                       | 42,000                            | 41,894                       |
| Telephone                            | 48,675                       | 49,326                       | 49,560                       | 51,000                            | 51,500                       |
| Printing                             | 7,629                        | 11,472                       | 10,000                       | 15,000                            | 17,500                       |
| Postage & Delivery                   | 33,400                       | 27,482                       | 28,350                       | 29,750                            | 31,550                       |
| NABRICO - Assoc. of Bar Co.s         | 10,959                       | 7,680                        | 18,650                       | 12,100                            | 13,750                       |
| Bank Charges & Interest              | 5,213                        | 56,088                       | 122,752                      | 114,500                           | 123,000                      |
| Repairs                              | 2,207                        | 523                          | 1,500                        | 0                                 | 0                            |
| Miscellaneous                        | <u>0</u>                     | <u>0</u>                     | <u>0</u>                     | <u>15,000</u>                     | <u>0</u>                     |
| Total Operating Expenses             | <u>\$2,266,674</u>           | <u>\$2,348,769</u>           | <u>\$2,565,414</u>           | <u>\$2,633,503</u>                | <u>\$2,641,457</u>           |
| Allocated to Excess Program          | <u>(\$430,857)</u>           | <u>(\$461,595)</u>           | <u>(\$433,228)</u>           | <u>(\$442,889)</u>                | <u>(\$484,563)</u>           |
| <br>                                 |                              |                              |                              |                                   |                              |
| Administration Department FTE        | 8.00                         | 10.00                        | 9.00                         | 9.00                              | 9.00                         |
| <br>                                 |                              |                              |                              |                                   |                              |
| <b>CHANGE IN OPERATING EXPENSES:</b> |                              |                              |                              |                                   |                              |
| Increase from 2015 Budget            |                              | 2.96%                        |                              |                                   |                              |
| Increase from 2015 Projections       |                              | 0.30%                        |                              |                                   |                              |

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
ACCOUNTING/INFORMATION TECHNOLOGY  
Presented to PLF Board of Directors on August 20, 2015**

|  | <u>2013<br/>ACTUAL</u> | <u>2014<br/>ACTUAL</u> | <u>2015<br/>BUDGET</u> | <u>2015<br/>PROJECTIONS</u> | <u>2016<br/>BUDGET</u> |
|--|------------------------|------------------------|------------------------|-----------------------------|------------------------|
| <b><u>Expenses</u></b>                       |                        |                        |                        |                             |                        |
| Salaries                                     | \$584,637              | \$576,354              | \$539,231              | \$546,843                   | \$598,523              |
| Benefits and Payroll Taxes                   | 199,808                | 200,385                | 226,758                | 184,536                     | 230,596                |
| Travel                                       | 544                    | 1,311                  | 5,000                  | 2,500                       | 2,500                  |
| Financial Audit                              | 22,600                 | 22,800                 | 26,000                 | 22,600                      | 23,000                 |
| Training                                     | <u>1,687</u>           | <u>4,487</u>           | <u>5,000</u>           | <u>2,000</u>                | <u>2,000</u>           |
| <br>Total Operating Expenses                 | <br><u>\$809,276</u>   | <br><u>\$805,336</u>   | <br><u>\$801,989</u>   | <br><u>\$758,479</u>        | <br><u>\$856,619</u>   |
| <br>Allocated to Excess Program              | <br><u>(\$111,674)</u> | <br><u>(\$90,264)</u>  | <br><u>(\$109,142)</u> | <br><u>(\$111,205)</u>      | <br><u>(\$116,260)</u> |
| <br><br>Accounting Department FTE            | <br><br>5.95           | <br><br>5.95           | <br><br>7.95           | <br><br>7.95                | <br><br>7.95           |
| <br><br><b>CHANGE IN OPERATING EXPENSES:</b> |                        |                        |                        |                             |                        |
| Increase from 2015 Budget                    |                        | 6.81%                  |                        |                             |                        |
| Increase from 2015 Projections               |                        | 12.94%                 |                        |                             |                        |



**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
LOSS PREVENTION (Includes OAAP)**

Presented to PLF Board of Directors on August 20, 2015

|   | <u>2013<br/>ACTUAL</u> | <u>2014<br/>ACTUAL</u> | <u>2015<br/>BUDGET</u> | <u>2015<br/>PROJECTIONS</u> | <u>2016<br/>BUDGET</u> |
|---|------------------------|------------------------|------------------------|-----------------------------|------------------------|
| <b><u>Expenses</u></b>  |                        |                        |                        |                             |                        |
| Salaries  | \$1,065,411            | \$1,111,996            | \$1,268,556            | \$1,240,383                 | \$1,269,122            |
| Benefits and Payroll Taxes                                    | 390,424                | 423,748                | 477,312                | 449,379                     | 471,472                |
| In Brief  | 46,731                 | 66,468                 | 70,000                 | 55,000                      | 70,000                 |
| PLF Handbooks   | 4,949                  | 45,758                 | 6,000                  | 5,000                       | 9,000                  |
| Library   | 389                    | 997                    | 5,000                  | 500                         | 1,000                  |
| Video and Audio Tapes   | 44,382                 | 33,193                 | 32,000                 | 30,000                      | 30,000                 |
| Mail Distribution of Video and Audiotapes                     | 14,607                 | 14,341                 | 14,000                 | 12,000                      | 12,000                 |
| Web Distribution of Programs                                  | 25,215                 | 58,940                 | 20,000                 | 35,000                      | 35,000                 |
| Program Promotion   | 16,863                 | 16,452                 | 22,000                 | 18,000                      | 22,000                 |
| Expense of Closing Offices                                    | 3,691                  | 7,330                  | 10,500                 | 14,000                      | 15,000                 |
| Facilities  | 42,828                 | 45,804                 | 47,000                 | 47,000                      | 47,000                 |
| Speaker Expense   | 4,466                  | (1,362)                | 5,000                  | 12,000                      | 10,000                 |
| Accreditation Fees  | 1,205                  | 956                    | 1,600                  | 1,200                       | 1,600                  |
| Beepers & Confidential Phone                                  | 5,110                  | 6,430                  | 5,300                  | 7,000                       | 7,000                  |
| Expert Assistance   | 0                      | 0                      | 5,000                  | 2,500                       | 5,000                  |
| Bad Debts from Loans  | 0                      | 2,325                  | 0                      | 0                           | 0                      |
| Memberships & Subscriptions                                   | 10,517                 | 11,855                 | 14,150                 | 11,600                      | 14,200                 |
| Travel  | 26,541                 | 30,792                 | 43,600                 | 20,265                      | 35,750                 |
| Training  | 25,420                 | 29,571                 | 42,500                 | 30,450                      | 44,000                 |
| Downtown Office   | 100,992                | 110,893                | 141,744                | 129,200                     | 141,856                |
| Miscellaneous   | <u>0</u>               | <u>60</u>              | <u>3,500</u>           | <u>3,000</u>                | <u>3,500</u>           |
| <br>Total Operating Expenses                                  | <br><u>\$1,829,743</u> | <br><u>\$2,016,547</u> | <br><u>\$2,234,762</u> | <br><u>\$2,123,477</u>      | <br><u>\$2,244,500</u> |
| <br>Allocated to Excess Program                               | <br><u>(\$209,540)</u> | <br><u>(\$225,930)</u> | <br><u>(\$120,701)</u> | <br><u>(\$124,757)</u>      | <br><u>(\$125,338)</u> |
| <br><b>Loss Prevention Department FTE<br/>(Includes OAAP)</b> | <br>11.83              | <br>13.58              | <br>14.58              | <br>14.08                   | <br>14.08              |
| <br><b>CHANGE IN OPERATING EXPENSES:</b>                      |                        |                        |                        |                             |                        |
| Increase from 2015 Budget                                     |                        | 0.44%                  |                        |                             |                        |
| Increase from 2015 Projections                                |                        | 5.70%                  |                        |                             |                        |

OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
CLAIMS DEPARTMENT

Presented to PLF Board of Directors on August 20, 2015

|                                | 2013<br><u>ACTUAL</u> | 2014<br><u>ACTUAL</u> | 2015<br><u>BUDGET</u> | 2015<br><u>PROJECTIONS</u> | 2016<br><u>BUDGET</u> |
|--------------------------------|-----------------------|-----------------------|-----------------------|----------------------------|-----------------------|
| <b><u>Expenses</u></b>         |                       |                       |                       |                            |                       |
| Salaries                       | \$1,853,764           | \$1,815,952           | \$1,851,790           | \$1,875,710                | \$1,973,214           |
| Benefits and Payroll Taxes     | 628,388               | 628,756               | 688,126               | 652,545                    | 710,610               |
| Training                       | 8,577                 | 4,620                 | 29,000                | 36,000                     | 36,000                |
| Travel                         | 4,966                 | 5,584                 | 12,600                | 8,000                      | 8,000                 |
| Library & Information Systems  | 32,659                | 31,741                | 39,000                | 29,500                     | 31,500                |
| Defense Panel Program          | <u>9,970</u>          | <u>1,915</u>          | <u>64,422</u>         | <u>67,500</u>              | <u>0</u>              |
| <br>                           |                       |                       |                       |                            |                       |
| Total Operating Expenses       | <u>\$2,538,325</u>    | <u>\$2,488,569</u>    | <u>\$2,684,938</u>    | <u>\$2,669,255</u>         | <u>\$2,759,324</u>    |
| <br>                           |                       |                       |                       |                            |                       |
| Allocated to Excess Program    | <u>(\$353,033)</u>    | <u>(\$343,000)</u>    | <u>(\$324,279)</u>    | <u>(\$322,955)</u>         | <u>(\$338,653)</u>    |
| <br>                           |                       |                       |                       |                            |                       |
| Claims Department FTE          | 18.10                 | 20.33                 | 19.40                 | 20.40                      | 20.40                 |
| <br>                           |                       |                       |                       |                            |                       |
| CHANGE IN OPERATING EXPENSES:  |                       |                       |                       |                            |                       |
| Increase from 2015 Budget      |                       | 2.77%                 |                       |                            |                       |
| Increase from 2015 Projections |                       | 3.37%                 |                       |                            |                       |

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
CAPITAL BUDGET**

**Presented to PLF Board of Directors on August 20, 2015**

|                                    | <u>2013<br/>ACTUAL</u> | <u>2014<br/>ACTUAL</u> | <u>2015<br/>BUDGET</u> | <u>2015<br/>PROJECTIONS</u> | <u>2016<br/>BUDGET</u> |
|------------------------------------|------------------------|------------------------|------------------------|-----------------------------|------------------------|
| <b><u>Capital Items</u></b>        |                        |                        |                        |                             |                        |
| Furniture and Equipment            | \$0                    | \$0                    | \$7,000                | \$8,000                     | \$7,000                |
| Telephone                          | 0                      | 0                      |                        | 0                           | 0                      |
| Copiers / Scanners                 | 0                      | 0                      | 5,000                  | 2,500                       | 5,000                  |
| Audiovisual Equipment              | 0                      | 0                      | 25,000                 | 0                           | 0                      |
| Data Processing                    |                        |                        |                        |                             |                        |
| Hardware                           | 0                      | 0                      | 22,000                 | 25,000                      | 25,000                 |
| Software                           | 0                      | 0                      | 6,000                  | 4,000                       | 6,000                  |
| PCs, Ipads and Printers            | 0                      | 0                      | 7,500                  | 7,500                       | 127,450                |
| Leasehold Improvements             | <u>0</u>               | <u>0</u>               | <u>5,000</u>           | <u>15,000</u>               | <u>10,000</u>          |
| <br>Total Capital Budget           | <br><u>\$0</u>         | <br><u>\$0</u>         | <br><u>\$77,500</u>    | <br><u>\$62,000</u>         | <br><u>\$180,450</u>   |
| <br>Increase from 2015 budget      |                        | 132.84%                |                        |                             |                        |
| <br>Increase from 2015 Projections |                        | 191.05%                |                        |                             |                        |

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 EXCESS PROGRAM BUDGET  
Presented to PLF Board of Directors on August 20, 2015**

|                                      | <u>2013<br/>ACTUAL</u> | <u>2014<br/>ACTUAL</u> | <u>2015<br/>BUDGET</u> | <u>2015<br/>PROJECTIONS</u> | <u>2016<br/>BUDGET</u> |
|--------------------------------------|------------------------|------------------------|------------------------|-----------------------------|------------------------|
| <b><u>Revenue</u></b>                |                        |                        |                        |                             |                        |
| Ceding Commission                    | 747,993                | 797,386                | 760,000                | 762,000                     | 762,000                |
| Profit Commission                    | 32,069                 | 22,021                 | 0                      | 0                           | 0                      |
| Installment Service Charge           | 41,433                 | 39,808                 | 42,000                 | 41,500                      | 42,000                 |
| Other                                | 7,913                  | 21,393                 | 6,900                  | 6,900                       | 6,900                  |
| Investment Earnings                  | <u>330,352</u>         | <u>218,440</u>         | <u>186,131</u>         | <u>60,605</u>               | <u>170,879</u>         |
| Total Revenue                        | <u>\$1,159,760</u>     | <u>\$1,099,049</u>     | <u>\$995,031</u>       | <u>\$871,005</u>            | <u>\$981,779</u>       |
| <b><u>Expenses</u></b>               |                        |                        |                        |                             |                        |
| Allocated Salaries                   | \$599,356              | \$621,781              | \$621,781              | \$621,781                   | \$586,164              |
| Direct Salaries                      | 73,078                 | 76,929                 | 0                      | 0                           | 0                      |
| Allocated Benefits                   | 226,874                | 228,602                | 228,602                | 228,602                     | 196,061                |
| Direct Benefits                      | 24,120                 | 30,051                 | 27,684                 | 0                           | 0                      |
| Program Promotion                    | 3,922                  | 8,625                  | 0                      | 7,500                       | 15,000                 |
| Investment Services                  | 1,982                  | 1,905                  | 2,500                  | 2,500                       | 2,850                  |
| Allocation of Primary Overhead       | 278,874                | 270,406                | 270,823                | 278,874                     | 282,589                |
| Reinsurance Placement Travel         | 369                    | 18,120                 | 25,000                 | 20,000                      | 20,000                 |
| Training                             | 0                      | 0                      | 500                    | 500                         | 500                    |
| Printing and Mailing                 | 4,035                  | 1,947                  | 5,500                  | 5,500                       | 6,500                  |
| Other Professional Services          | 0                      | 16                     | 2,000                  | 2,000                       | 2,000                  |
| Software Development                 | <u>0</u>               | <u>0</u>               | <u>0</u>               | <u>0</u>                    | <u>0</u>               |
| Total Expense                        | <u>\$1,212,611</u>     | <u>\$1,258,383</u>     | <u>\$1,184,390</u>     | <u>\$1,167,257</u>          | <u>\$1,111,664</u>     |
| Allocated Depreciation               | <u>\$30,056</u>        | <u>\$24,366</u>        | <u>\$20,699</u>        | <u>\$16,980</u>             | <u>\$17,200</u>        |
| Net Income                           | <u>(\$82,907)</u>      | <u>(\$183,700)</u>     | <u>(\$210,058)</u>     | <u>(\$313,232)</u>          | <u>(\$147,085)</u>     |
| Full Time Employees                  | 1.00                   | 1.00                   | 0.00                   | 0.00                        | 0.00                   |
| Number of Covered Attorneys          | 2,193                  | 2,395                  | 2,140                  | 2,025                       | 2,025                  |
| <b>CHANGE IN OPERATING EXPENSES:</b> |                        |                        |                        |                             |                        |
| Decrease from 2015 Budget            |                        | -6.14%                 |                        |                             |                        |
| Decrease from 2015 Projections       |                        | -4.76%                 |                        |                             |                        |

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** August 24, 2015  
**From:** Carol J. Bernick, PLF CEO  
**Re:** 2016 PLF Claims Made Primary Plan, Excess Plan, and Pro Bono Plan

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### **Action Recommended**

The Board of Directors (BOD) of the Professional Liability Fund requests that the Board of Governors approve the proposed 2016 PLF Claims Made Plan, Excess Plan, and Pro Bono Plan. There are changes to all three plans.

### **Background**

There are three operative PLF Coverage Plans – the Primary Program Coverage Plan, the Excess Plan, and the Pro Bono Plan. The Excess Plan covers firms and individuals who purchase excess coverage from the PLF. The Pro Bono Plan covers lawyers who volunteer for OSB approved legal services programs, but who do not have malpractice coverage either from the PLF or another source.

The PLF convened a work group to do a complete review of the Primary Plan. That group consisted of Madeleine Campbell, Claims Attorney, Bill Earle, coverage counsel for the Fund, Jeff Crawford and Emilee Preble, who run the excess program, and me.

The substantive changes are in Exclusion 2 (Wrongful Conduct), Exclusion 8 (ORPC 1.8 Conflict Letters); Exclusion 10 (Business of Law Practice); and Exclusion 11 (Family Members).

#### Exclusion 2: Wrongful Conduct

The primary purpose of the changes was to clarify for both the covered parties and the Fund what activities should be excluded.

#### Exclusion 8: ORPC 1.8 Conflict Letters

The previous language required covered parties to send the PLF copies of their conflict letters and the PLF could deny coverage if the letter was not sent. But we have had situations where letters were properly sent by the covered party and not sent to the PLF and it seemed to be a harsh outcome to deny coverage based on this technicality. This is particularly true given that the PLF does not – and would not – endorse or otherwise approve the form of the letter. By eliminating the requirement that the letter be sent to the PLF (coverage could still be denied if the letter is not sent), we avoid any implication of approval of the form of letter sent to us.

Exclusion 10: Business of Law Practice

These changes are intended to clarify what is the practice of law and what is the business of law. This issue arises most frequently in fee disputes.

Exclusion 11: Family Members

This change makes clear that if a partner does legal work for a family member or a family member's business, not only is there no coverage for that attorney, but there is no coverage for the law firm. This does not prevent a lawyer in your firm from doing work for your family member or his/her business.

Excess Plan: Section XIV – Extended Reporting (ERC)

We changed the ERC eligibility to be discretionary. Although most firms would be offered ERC, we want to have flexibility to deny ERC if facts and circumstances warrant it.

Excess Plan: Rates

Although the rates are not part of the Plan, the PLF is eliminating the current two-tier rate model for a more viable underwriting rating scheme. This change will eliminate the BOG's approval of specific rates and replace it with approval of the rating policy. This will be presented at a future BOG meeting.

This review was useful for the work group and for the Board. It caused us to identify other provisions of the Plan that warrant further review and possible changes, which we will undertake next year.

Attachments:

- 2016 PLF Primary Coverage Plan - Tracked
- 2016 PLF Excess Coverage Plan - Tracked
- 2016 PLF Pro Bono Coverage Plan - Tracked

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND**

**201~~65~~ CLAIMS MADE PLAN**

**NOTICE**

This Claims Made Plan (“Plan”) contains provisions that reduce the Limits of Coverage by the costs of legal defense. See SECTIONS IV and VI.

Various provisions in this Plan restrict coverage. Read the entire Plan to determine rights, duties, and what is and is not covered.

**INTERPRETATION OF THIS PLAN**

**~~Preface and Aid to Interpretation.~~** The Professional Liability Fund (“PLF”) is an instrumentality of the Oregon State Bar created pursuant to powers delegated to it in ORS 9.080(2)(a). ~~The statute states in part:~~

~~The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer’s professional liability fund.~~

~~Pursuant to this statute, the Board of Governors of the Oregon State Bar created a professional liability fund (the Professional Liability Fund) not subject to state insurance law. The initial Plan developed to implement the Board of Governors’ decision, and all subsequent changes to the Plan are approved by both the Board of Directors of the Professional Liability Fund and the Board of Governors.~~

The Plan is not intended to cover all claims that can be made against Oregon lawyers. The limits, exclusions, and conditions of the Plan are in place to enable the PLF to meet the statutory requirements and to meet the Mission and Goals set forth in Chapter One of the PLF Policies, ~~which includes the Goal~~including, “To provide the mandatory professional liability coverage consistent with a sound financial condition, superior claims handling, efficient administration, and effective loss prevention.” The limits, exclusions, and conditions are to be fairly and objectively construed for that purpose. While mandatory malpractice coverage and the existence of the Professional Liability Fund do provide incidental benefits to the public, the Plan is not to be construed as written with the public as an intended beneficiary. The Plan is not an insurance policy ~~and is not an adhesion contract.~~

Because the Plan has limits and exclusions, members of the Oregon State Bar are encouraged to purchase excess malpractice coverage and coverage for excluded claims through general liability and other insurance policies. Lawyers and their firms should consult with their own insurance agents as to available coverages. Excess malpractice coverage is also available through the PLF.

~~**Bracketed Titles.** The bracketed titles appearing throughout this Plan are not part of the Plan and should not be used as an aid in interpreting the Plan. The bracketed titles are intended simply as a guide to locating pertinent provisions.~~

~~**Use of Capitals.** Capitalized terms are defined in SECTION I. The definition of COVERED PARTY appearing in SECTION II and the definition of COVERED ACTIVITY appearing in SECTION III are particularly crucial to the understanding of the Plan.~~

**Plan Comments.** The discussions labeled "*COMMENTS*" following various provisions of the Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Plan.

~~The Comments are similar in form to those in the Uniform Commercial Code and Restatements. They are intended to aid in the construction of the Plan language. The Comments are to assist attorneys in interpreting the coverage available to them and to provide a specific basis for interpretation by courts and arbitrators.~~

~~**Attorneys in Private Practice; Coverage and Exemption.** Only Oregon attorneys engaged in the "private practice of law" whose principal office is in Oregon are covered by this Plan. ORS 9.080(2). An attorney not engaged in the private practice of law in Oregon or whose principal office is outside Oregon must file a request for exemption with the PLF indicating the attorney is not subject to PLF coverage requirements. Each year, participating attorneys are issued a certificate entitled "Claims Made Plan Declarations." The participating attorney is listed as the "Named Party" in the Declarations.~~

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## SECTION I — DEFINITIONS

Throughout this Plan, when appearing in capital letters:

1. "BUSINESS TRUSTEE" means one who acts in the capacity of or with the title "trustee" and whose activities include the operation, management, or control of any business property, business, or institution in a manner similar to an owner, officer, director, partner, or shareholder.

### *COMMENTS*

~~The term "*BUSINESS TRUSTEE*" is used in SECTION III.3 and in SECTION V.5. This Plan is intended to cover the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan is not intended to cover *BUSINESS TRUSTEE* activities as defined in this Subsection. Examples of types of *BUSINESS TRUSTEE* activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.~~

~~Attorneys who engage in *BUSINESS TRUSTEE* activities as defined in this Subsection are encouraged to obtain appropriate insurance coverage from the commercial market for their activities.~~

2. "CLAIM" means a demand for DAMAGES or written notice to a COVERED PARTY of an intent to hold a COVERED PARTY liable as a result of a COVERED ACTIVITY, if such notice might reasonably be expected to result in an assertion of a right to DAMAGES.



3. "CLAIMS EXPENSE" means:
- a. Fees and expenses charged by any attorney designated by the PLF;
  - b. All other fees, costs, and expenses resulting from the investigation, adjustment, defense, repair and appeal of a CLAIM, if incurred by the PLF; or
  - c. Fees charged by any attorney designated by the COVERED PARTY with the PLF's written consent.

However, CLAIMS EXPENSE does not include the PLF's costs for compensation of its regular employees and officials or the PLF's other routine administrative costs.

4. "CLAIMS EXPENSE ALLOWANCE" means the separate allowance for aggregate CLAIMS EXPENSE for all CLAIMS as provided for in SECTION VI.1.b of this Plan.
5. "COVERAGE PERIOD" means the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."
6. "COVERED ACTIVITY" means conduct qualifying as such under SECTION III — WHAT IS A COVERED ACTIVITY.
7. "COVERED PARTY" means any person or organization qualifying as such under SECTION II — WHO IS A COVERED PARTY.
8. "DAMAGES" means money to be paid as compensation for harm or loss. It does not refer to fines, penalties, punitive or exemplary damages, or equitable relief such as restitution, disgorgement, rescission, injunctions, accountings, or damages and relief otherwise excluded by this Plan.
9. "EXCESS CLAIMS EXPENSE" means any CLAIMS EXPENSE in excess of the CLAIMS EXPENSE ALLOWANCE. EXCESS CLAIMS EXPENSE is included in the Limits of Coverage at SECTION VI.1.a and reduces amounts available to pay DAMAGES under this Plan.
10. "INVESTMENT ADVICE" refers to any of the following activities:
- a. Advising any person, firm, corporation, or other entity respecting the value of a particular investment, or recommending investing in, purchasing, or selling a particular investment;
  - b. Managing any investment;
  - c. Buying or selling any investment for another;
  - d. (1) Acting as a broker for a borrower or lender, or  
(2) Advising or failing to advise any person in connection with the borrowing of any funds or property by any COVERED PARTY for the COVERED PARTY or for another;

- e. Issuing or promulgating any economic analysis of any investment, or warranting or guaranteeing the value, nature, collectability, or characteristics of any investment;
  - f. Giving advice of any nature when the compensation for such advice is in whole or in part contingent or dependent on the success or failure of a particular investment; or
  - g. Inducing someone to make a particular investment.
11. "LAW ENTITY" refers to a professional corporation, partnership, limited liability partnership, limited liability company, or sole proprietorship engaged in the private practice of law in Oregon.
12. "PLAN YEAR" means the period January 1 through December 31 of the calendar year for which this Plan was issued.
13. "PLF" means the Professional Liability Fund of the Oregon State Bar.
14. "SAME OR RELATED CLAIMS" means two or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, ~~liability~~liabilities, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus. ~~CLAIMS are related in the following situations~~Examples include, but are not limited to, the following:
- a. *Secondary or dependent liability.* CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are related to the CLAIMS on which they are based.
  - b. *Same transactions or occurrences.* Multiple CLAIMS arising out of the same transaction or occurrence or series of transactions or occurrences are related. However, with regard to this Subsection b only, the PLF will not treat the CLAIMS as related if:
    - (1) The participating COVERED PARTIES acted independently of one another;
    - (2) They represented different clients or groups of clients whose interests were adverse; and
    - (3) The claimants do not rely on any common theory of liability or damage.
  - c. *Alleged scheme or plan.* If claimants ~~attempt to~~ tie together different acts as part of an alleged overall scheme or operation, then the CLAIMS are related.
  - d. *Actual pattern or practice.* Even if a scheme or practice is not alleged, CLAIMS that arise from a method, pattern, or practice in fact used or adopted by one or more COVERED PARTIES or LAW ENTITIES in representing multiple clients in similar matters are related.
  - e. *One loss.* When successive or collective errors each cause or contribute to single or multiple clients' and/or claimants' harm or cumulatively enhance their damages or losses, then the CLAIMS are related.
  - f. *Class actions.* All CLAIMS alleged as part of a class action or purported class action are

related.

## COMMENTS

**SAME OR RELATED CLAIMS.** Each PLF Plan sets a maximum limit of coverage per year. This limit defines the PLF's total maximum obligation under the terms of each Plan issued by the PLF. However, absent additional Plan provisions, numerous circumstances could arise in which the PLF, as issuer of other PLF Plans, would be liable beyond the limits specified in one individual Plan. For example, Plans issued to the same attorney in different PLAN YEARS might apply. Or, Plans issued to different attorneys might all apply. In some circumstances, the PLF ~~intends to may~~ extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF ~~does not so intend~~ will not extend separate limits under each Plan. Because the concept of "relatedness" is broad and factually based, there is no one definition or rule that will apply to every situation. The PLF has therefore elected to explain its intent by listing certain circumstances in which only one limit is available regardless of the number of Plans that may apply. See Subsections 14.a to 14.f above. To aid in interpretation, the following are examples of SAME OR RELATED CLAIMS:

*Example No. 1: Attorney A is an associate in a firm and commits malpractice. CLAIMS are made against Attorney A and various partners in the firm. All attorneys share one limit. CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are always related to the CLAIMS on which they are based. See Subsection 14.a above. Even if Attorney A and some of the other lawyers are at different firms at the time of the CLAIM, all attorneys and the firm share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE.*

*Example No. 2: Attorney A writes a tax opinion for an investment offering, and Attorneys B and C, with a different law firm, assemble the offering circular. Investors 1 and 2 bring CLAIMS in 2010 and Investor 3 brings a CLAIM in 2011 relating to the offering. No CLAIM is asserted prior to 2010. Only one Limit of Coverage applies to all CLAIMS. This is because the CLAIMS arise out of the same transaction or occurrence, or series of transactions or occurrences. See Subsection 14.b above. CLAIMS by investors in the same or similar investments will almost always be related. However, because the CLAIMS in this example are made against COVERED PARTIES in two different firms, up to two CLAIMS EXPENSE ALLOWANCES may potentially apply. See Section VI.2. Note also that, under these facts, all CLAIMS against Attorneys A, B, and C are treated as having been first made in 2010, pursuant to Section IV.1.b(2). This could result in available limits having been exhausted before a CLAIM is eventually made against a particular COVERED PARTY. The timing of making CLAIMS does not increase the available limits.*

*Example No. 3: Attorneys A and B represent husband and wife, respectively, in a divorce. Husband sues A for malpractice in litigating his prenuptial agreement. Wife sues B for not getting her proper custody rights over the children. A's and B's CLAIMS are not related. A's and B's CLAIMS would be related, but for the exception in the second sentence of Subsection 14.b above.*

*Example No. 4: An owner sells his company to its employees by selling shares to two employee benefit plans set up for that purpose. The plans and/or their members sue the company, its outside corporate counsel A, its ERISA lawyer B, the owner, his attorney C, and the plans' former attorney D, contending there were improprieties in the due diligence, the form of the agreements, and the amount and value of shares issued. The defendants file cross-claims. All CLAIMS are related. ~~They~~ They arise out of the same transactions or occurrences and therefore are related under Subsection 14.b. For the exception in Subsection 14.b to apply, all three elements must be satisfied. The exception does not apply because the claimants rely on common theories of liability. In*

addition, the exception may not apply because not all interests were adverse, theories of damages are common, or the attorneys did not act independently of one another. Finally, even if the exception in Subsection 14.b did apply, the CLAIMS would still be related under Subsection 14.d because they involve one loss. Although the CLAIMS are related, if all four attorneys' firms are sued, depending on the circumstances, up to four total CLAIMS EXPENSE ALLOWANCES might be available under Section VI.2.

Example No. 5: Attorney F represents an investment manager for multiple transactions over multiple years in which the manager purchased stocks in Company A on behalf of various groups of investors. Attorneys G and H represent different groups of investors. Attorney J represents Company A. Attorneys F, G, H, and J are all in different firms. They are all sued by the investors for securities violations arising out of this group of transactions. ~~Although the different acts by different lawyers at different times could legitimately be viewed as separate and unconnected, the claimant in this example attempts to tie them together as part of an alleged overall scheme or operation.~~ The CLAIMS are related because the claimants have made them so. See Subsection 14.c above. This will often be the case in securities CLAIMS. As long as such allegations remain in the case, only one limit will be available, even if alternative CLAIMS are also alleged. In this example, although there is only one Limit of Coverage available for all CLAIMS, depending on the circumstances, multiple CLAIMS EXPENSE ALLOWANCES might be available. See Section VI.2.

Example No. 6: Attorneys A, B, and C in the same firm represent a large number of asbestos clients over ten years' time, using a firm-wide formula for evaluating large numbers of cases with minimum effort. They are sued by certain clients for improper evaluation of their cases' values, although the plaintiffs do not allege a common scheme or plan. Because the firm in fact operated a firm-wide formula for handling the cases, the CLAIMS are related based on the COVERED PARTIES' own pattern or practice. The CLAIMS are related because the COVERED PARTIES' own conduct has made them so. See Subsection 14.d above. Attorneys A, B, and C will share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE. LAW ENTITIES should protect themselves from such CLAIMS brought by multiple clients by purchasing adequate excess insurance.

Example No. 7: Attorney C represents a group of clients at trial and commits certain errors. Attorney D of the same firm undertakes the appeal, but fails to file the notice of appeal on time. Attorney E is hired by clients to sue Attorneys C and D for malpractice, but misses the statute of limitations. Clients sue all three attorneys. The CLAIMS are related and only a single Limit of Coverage applies to all CLAIMS. See Subsection 14.e above. When, as in this example, successive or collective errors each cause single or multiple clients and/or claimants harm or cumulatively enhance their damages or losses, then the CLAIMS are related. In such a situation, a claimant or group of claimants cannot increase the limits potentially available by alleging separate errors by separate attorneys. Attorney E, however, may be entitled to a CLAIMS EXPENSE ALLOWANCE separate from the one shared by C and D.

Example No. 8: Attorneys A, B, and C in the same firm represent a large banking institution. They are sued by the bank's customers in a class action lawsuit for their part in advising the bank on allegedly improper banking practices. All CLAIMS are related. No class action or purported class action can ever trigger more than one Limit of Coverage. See Subsection 14.f above.

**15.** "SUIT" means a civil proceeding in which DAMAGES are alleged. SUIT includes an arbitration or alternative dispute resolution proceeding to which the COVERED PARTY submits with the consent of the PLF.

16. "YOU" and "YOUR" mean the Named Party shown in the Declarations.

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## SECTION II — WHO IS A COVERED PARTY

1. The following are COVERED PARTIES:
- a. YOU.
  - b. In the event of YOUR death, adjudicated incapacity, or bankruptcy, YOUR conservator, guardian, trustee in bankruptcy, or legal or personal representative, but only when acting in such capacity.
  - c. Any attorney or LAW ENTITY legally liable for YOUR COVERED ACTIVITIES, but only to the extent such legal liability arises from YOUR COVERED ACTIVITIES.
2. Notwithstanding Subsection 1, no business enterprise (except a LAW ENTITY) or any partner, proprietor, officer, director, stockholder, or employee of such business enterprise is a COVERED PARTY.

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## SECTION III — WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES, if the acts, errors, or omissions occur during the COVERAGE PERIOD; or prior to the COVERAGE PERIOD, if on the effective date of this Plan YOU have no knowledge that any CLAIM has been asserted arising out of such prior act, error, or omission, and there is no prior policy or Plan that provides coverage for such liability or CLAIM resulting from the act, error, or omission, whether or not the available limits of liability of such prior policy or Plan are sufficient to pay any liability or CLAIM:

~~[YOUR CONDUCT]~~

1. Your Conduct. Any act, error, or omission committed by YOU that satisfies all of the following criteria:
- a. YOU committed the act, error, or omission in rendering professional services in YOUR capacity as an attorney in private practice, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney in private practice.
  - b. At the time YOU rendered or failed to render these professional services:
    - (1) YOUR principal office was located in the State of Oregon;
    - (2) YOU were licensed to practice law in the State of Oregon; and
    - (3) Such activity occurred after any Retroactive Date shown in the Declarations.

~~[CONDUCT OF OTHERS]~~

2. **Conduct of Others.** Any act, error, or omission committed by a person for whose conduct YOU are legally liable in YOUR capacity as an attorney, provided at the time of the act, error, or omission each of the following criteria was satisfied:

- a. The act, error, or omission causing YOUR liability:
  - (1) Arose while YOU were licensed to practice law in the State of Oregon;
  - (2) Arose while YOUR principal office was located in the State of Oregon; and
  - (3) Occurred after any Retroactive Date shown in the Declarations.
- b. The act, error, or omission, if committed by YOU, would constitute the rendering of professional services in YOUR capacity as an attorney in private practice.
- c. The act, error, or omission was not committed by an attorney who at the time of the act, error, or omission:
  - (1) Maintained his or her principal office outside the State of Oregon; or
  - (2) Maintained his or her principal office within the State of Oregon and either:
    - (a) Claimed exemption from participation in the Professional Liability Fund, or
    - (b) Was not an active member of the Oregon State Bar.

~~[YOUR CONDUCT IN A SPECIAL CAPACITY]~~

3. **Your Conduct in a Special Capacity.** Any act, error, or omission committed by YOU in YOUR capacity as a personal representative, administrator, conservator, executor, guardian, guardian *ad litem*, special representative pursuant to ORS 128.179, or trustee (except BUSINESS TRUSTEE); provided that the act, error, or omission arose out of a COVERED ACTIVITY as defined in Subsections 1 and 2 above, and the CLAIM is brought by or for the benefit of a beneficiary of the special capacity relationship and arises out of a breach of that relationship.

#### COMMENTS

*To qualify for coverage, a CLAIM must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage including the following:*

***Principal Office.*** *To qualify for coverage, a COVERED PARTY'S "principal office" must be located in the State of Oregon at the time specified in the definition. "Principal office" as used in the Plan has the same definition as provided in ORS 9.080(2)(c). For further clarification, see PLF Board of Directors Policy 3.180 (available on the PLF website, [www.osbplf.org](http://www.osbplf.org) or telephone the PLF to request a copy).*

***Prior CLAIMS.*** *Section III limits the definition of COVERED ACTIVITY with respect to acts,*

errors, or omissions that happen prior to the COVERAGE PERIOD, so that no coverage is granted when there is prior knowledge or prior insurance. For illustration of the application of this language, see *Chamberlin v. Smith*, 140 Cal Rptr 493 (1977).

~~To the extent there is prior insurance or other coverage applicable to the CLAIM, it is reasonable to omit the extension of further coverage. Likewise, to the extent YOU have knowledge that particular acts, errors, or omissions have given rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered. Such CLAIMS should instead be covered under the policy or PLF PLAN in force, if any, at the time the first such CLAIM was made.~~

**Types of Activity.** COVERED ACTIVITIES have been divided into three categories. Subsection 1 deals with coverage for YOUR conduct as an attorney in private practice. Subsection 2 deals with coverage for YOUR liability for the conduct of others. Subsection 3 deals with coverage for YOUR conduct in a special capacity (e.g., as a personal representative of an estate). The term "BUSINESS TRUSTEE" as used in this section is defined in Section I.

**Professional Services.** To qualify for coverage under Section III.1 and III.2.b, the act, error or omission causing YOUR liability must be committed "in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney." This language limits coverage to those activities commonly regarded as the rendering of professional services as a lawyer. This language, in addition to limiting coverage to YOUR conduct as a lawyer, is expressly intended to limit the definition of COVERED ACTIVITY so that it does not include YOUR conduct in carrying out the commercial or administrative aspects of law practice. Examples of commercial or administrative activities could include: collecting fees or costs; guaranteeing that the client will pay third parties (e.g., court reporters, experts or other vendors) for services provided; depositing, endorsing or otherwise transferring negotiable instruments; depositing or withdrawing monies or instruments into or from trust accounts; or activities as a trustee that require no specialized legal skill or training, such as paying bills on time or not incurring unnecessary expenses. The foregoing list of commercial or administrative activities is not exclusive, but rather is illustrative of the kinds of activities that are regarded as part of the commercial aspect of law practice (not covered), as opposed to the rendering of professional services (covered).

*Example.* A client purports to hire the Covered Party and provides the Covered Party with a cashier's check, which the Covered Party deposits into her firm's client trust account. The Covered Party, on the client's instructions, wire-transfers some of the proceeds of the cashier's check to a third party. The cashier's check later turns out to be forged and the funds transferred out of the trust account belonged to other clients. The Covered Party is later sued by a third party such as a bank or other client arising out of the improper transfer of funds. The Covered Party's conduct is not covered under her PLF Plan. Placing, holding or disbursing funds in lawyer trust accounts are not considered professional services for purposes of the PLF Plan.

**Special Capacity.** Subsection 3 provides limited coverage for YOUR acts as a personal representative, administrator, conservator, executor, guardian, or trustee. However, not all acts in a special capacity are covered under this Plan. Attorneys acting in a special capacity, as described in Subsection III.3 may subject themselves to claims from third parties that are beyond the coverage provided by this Plan. For example, in acting as a conservator or personal representative, an attorney may engage in certain business activities, such as terminating an employee or signing a contract. If such

actions result in a claim by the terminated employee or the other party to the contract, the estate or corpus should respond to such claims in the first instance, and should protect the attorney in the process. Attorneys engaged in these activities should obtain appropriate commercial general liability, errors and omissions, or other commercial coverage. The claim will not be covered under Subsection III.3.

The Plan ~~purposefully~~ uses the term "special capacity" rather than "fiduciary" in Subsection 3 to avoid any implication that this coverage includes fiduciary obligations other than those specifically identified. There is no coverage for YOUR conduct under Subsection 3 unless YOU were formally named or designated as a personal representative, administrator, conservator, executor, guardian, or trustee (except BUSINESS TRUSTEE) and served in such capacity.

**Ancillary Services.** Some law firms ~~are now branching out and providing~~ provide their clients with ancillary services, either through their own lawyers and staff or through affiliates. These ancillary services ~~can~~ may include such activities as architectural and engineering consulting, counseling, financial and investment services, lobbying, marketing, advertising, trade services, public relations, real estate development and appraisal, and other services. Only CLAIMS arising out of services falling within the definition of COVERED ACTIVITY will be covered under this Plan. For example, a lawyer-lobbyist engaged in the private practice of law, including conduct such as advising a client on lobbying reporting requirements or drafting or interpreting proposed legislation, would be engaged in a COVERED ACTIVITY and would be covered. Generally, however, ancillary services will not be covered because of this requirement.

The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This covers the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan does not cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.

Attorneys who engage in BUSINESS TRUSTEE activities as defined in this Subsection are encouraged to obtain appropriate insurance coverage from the commercial market for their activities.

**Retroactive Date and Prior Acts.** Section III introduces the concept of a Retroactive Date. No Retroactive Date will apply to any attorney who has held coverage with the PLF continuously since the inception of the PLF. Attorneys who first obtained coverage with the PLF at a later date and attorneys who have interrupted coverage will find a Retroactive Date in the Declarations. This date will be the date on which YOUR most recent period of continuous coverage commenced. This Plan does not cover CLAIMS arising out of conduct prior to the Retroactive Date.

## SECTION IV — GRANT OF COVERAGE

### 1. Indemnity.

- a. The PLF will pay those sums that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Plan applies. No other obligation or liability to pay sums or perform acts or services is covered



unless specifically provided for under Subsection 2 - Defense.

**b.** This Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

**(1)** The applicable COVERAGE PERIOD for a CLAIM will be the earliest of:

**(a)** When a lawsuit is filed or an arbitration or ADR proceeding is formally initiated; or

**(b)** When notice of a CLAIM is received by any COVERED PARTY or by the PLF; or

**(c)** When the PLF first becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM; or

**(d)** When a claimant intends to make a CLAIM but defers assertion of the CLAIM for the purpose of obtaining coverage under a later COVERAGE PERIOD and the COVERED PARTY knows or should know that the COVERED ACTIVITY that is the basis of the CLAIM could result in a CLAIM.

**(2)** Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or CLAIM).

**c.** This Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

**d.** The amount the PLF will pay for damages is limited as described in SECTION VI.

## **2. Defense.**

**a.** Until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage extended by this Plan are exhausted, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

**b.** With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all reasonable and necessary CLAIMS EXPENSE ~~incurred~~the PLF may incur. All payments for EXCESS CLAIMS EXPENSE will reduce the Limits of Coverage.

c. If the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage extended by this Plan are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

#### COMMENTS

**Claims Made Coverage.** *As claims made coverage, this Plan applies to CLAIMS first made during the time period shown in the Declarations. CLAIMS first made either prior to or subsequent to that time period are not covered by this Plan, although they may be covered by a prior or subsequent PLF Plan.*

**Damages.** *This Plan grants coverage only for CLAIMS seeking DAMAGES. There is no coverage granted for other claims, actions, suits, or proceedings seeking equitable remedies such as restitution of funds or property, disgorgement, accountings or injunctions.*

~~**When Claim First Made to PLF.** *Subsection 1.b(1) of this section is intended to make clear that the earliest of the several events listed determines when the CLAIM is first made. Subsection 1.b(1)(c) adopts an objective, reasonable person standard to determine when the PLF's knowledge of facts or circumstances can rise to the level of a CLAIM for purpose of triggering an applicable COVERAGE PERIOD. This subsection is based solely on the objective nature of information received by the PLF. Covered Parties should thus be aware that any information or knowledge they may have that is not transmitted to the PLF is irrelevant to any determination made under this subsection.*~~

*If facts or circumstances meet the requirements of subsection 1.b(1)(c), then any subsequent CLAIM that constitutes a SAME OR RELATED CLAIM under Section 1.14 will relate back to the COVERAGE PERIOD at the time the original notice of information was provided to the PLF.*

**SAME OR RELATED CLAIMS.** *Subsection 1.b(2) states a special rule applicable when several CLAIMS arise out of the SAME OR RELATED CLAIMS. Under this rule, all such SAME OR RELATED CLAIMS are considered first made at the time the earliest of the several SAME OR RELATED CLAIMS is first made. Thus, regardless of the number of claimants asserting SAME OR RELATED CLAIMS, the number of PLAN YEARS involved, or the number of transactions giving rise to the CLAIMS, all such CLAIMS are treated as first made in the earliest applicable PLAN YEAR and only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE apply. There is an exception to the special rule in Subsection 1.b(2) for COVERED PARTIES who had no coverage (with the PLF or otherwise) at the time the initial CLAIM was made, but this exception does not create any additional Limits of Coverage. Pursuant to Subsection VI.2, only one Limit of Coverage would be available.*

**Scope of Duty to Defend.** *Subsection 2 defines the PLF's obligation to defend. The obligation to defend continues only until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage are exhausted. In that event, the PLF will tender control of the defense to the COVERED PARTY or excess insurance carrier, if any. The PLF's payment of the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage ends all of the PLF's duties.*

~~**Control of Defense.** *Subsection 2.a allocates to the PLF control of the investigation, settlement, and defense of the CLAIM. See SECTION IX ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY.*~~

~~**Costs of Defense.** *Subsection 2.b obligates the PLF to pay reasonable and necessary costs of defense. Only those expenses incurred by the PLF or with the PLF's authority are covered.*~~

## SECTION V — EXCLUSIONS FROM COVERAGE

### ~~[WRONGFUL CONDUCT EXCLUSIONS]~~

1. **Fraudulent Claim Exclusion.** This Plan does not apply to a COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.
2. **Wrongful Conduct Exclusion.** This Plan does not apply to any of the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended by YOU:
  - (a) any CLAIM arising out of or in any way connected with YOUR actual or alleged criminal act or conduct;
  - (b) any CLAIM based on YOUR actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct, or to any such act or conduct by another of which YOU had personal knowledge and in which you acquiesced or remained passive;
  - (c) any claim based on YOUR intentional violation of the Oregon Rules of Professional Conduct (ORPC) or other applicable code of professional conduct, or to any such violation of such codes by another of which you had personal knowledge and in which YOU acquiesced or remained passive.
  - (d) This Plan does not apply to any CLAIM based on or arising out of YOUR non-payment of a valid and enforceable lien if actual notice of such lien was provided to YOU, or to anyone employed in YOUR office, prior to payment of the funds to a person or entity other than the rightful lien-holder.

~~This Plan does not apply to any CLAIM based on or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof.~~

### COMMENTS

*Exclusions 1 and 2 set out the circumstances in which wrongful conduct will eliminate coverage. An intent to harm is not required.*

***Voluntary Exposure to CLAIMS.*** *An attorney may sometimes voluntarily expose himself or herself to a CLAIM or known risk through a course of action or inaction when the attorney knows there is a more reasonable alternative means of resolving a problem. For example, an attorney might disburse settlement proceeds to a client even though the attorney knows of valid hospital, insurance company, or PIP liens, or other valid liens or claims to the funds. If the attorney disburses the proceeds to the client and a CLAIM arises from the ~~other claimants,~~ lien holder, Exclusion 2 will apply and the CLAIM will not be covered.*

***Unethical Conduct.*** *If a CLAIM arises that involves unethical conduct by an attorney, Exclusion 2 may also apply. ~~to the conduct and the CLAIM would therefore not be covered. This can occur, f~~For example, if an attorney violates Disciplinary Rule ORPC 8.4(a)(3) (engaging in conduct involving*

dishonesty, fraud, deceit, or misrepresentation) or ORPC 5.5(a) (aiding a nonlawyer in the unlawful practice of law) and a CLAIM results. Exclusion 2 will apply and the CLAIM will not be covered.

*Example: Attorney A allows a title company to use his name, letterhead, or forms in connection with a real estate transaction in which Attorney A has no significant involvement. Attorney A's activities violate ORPC 8.4(a)(3) and ORPC 5.5(a). A CLAIM is made against Attorney A in connection with the real estate transaction. Because Attorney A's activities fall within the terms of Exclusion 2, there will be no coverage for the CLAIM. In addition, the CLAIM likely would not even be within the terms of the coverage grant under this Plan because the activities giving rise to the CLAIM do not fall within the definition of a COVERED ACTIVITY. The same analysis would apply if Attorney A allowed an insurance or investment company to use his name, letterhead, or forms in connection with a living trust or investment transaction in which Attorney A has no significant involvement.*

3. **Disciplinary Proceedings Exclusion.** This Plan does not apply to any CLAIM based on or arising out of a proceeding brought against YOU by the Oregon State Bar or any similar entity.

4. **Punitive Damages and Cost Award Exclusions.** This Plan does not apply to:

- a. The part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or
- b. Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct, false or unwarranted certification in a pleading, ~~and~~ or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### COMMENTS

*A COVERED PARTY may become subject to punitive or exemplary damages, attorney fees, costs, fines, penalties, or other sanctions in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.*

*Subsection a of Exclusion 4 applies to direct actions for punitive, exemplary or enhanced damages. It excludes coverage for that part of any CLAIM asserting such damages. In addition, such CLAIMS do not involve covered DAMAGES as defined in this Plan. If YOU are sued for punitive damages, YOU are not covered for that exposure. Similarly, YOU are not covered to the extent compensatory damages are doubled, trebled or otherwise enhanced.*

*Subsection b of Exclusion 4 applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. It excludes coverage for any monetary sanction arising from an ~~The courts have become increasingly intolerant of attorney's' improper conduct in actions in several areas including trial practice, discovery, and conflicts of interest, such as is described in ORCP 17 and FRCPII. Statutes, court rules, and common law approaches imposing various monetary sanctions have been developed to deter such inappropriate conduct. The purpose of these sanctions would be threatened if the PLF were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.~~*

*Thus, ~~if~~ YOU cause YOUR client to be subjected to a punitive damage award (based upon the*

client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, the PLF will cover YOUR liability for the punitive damages suffered by YOUR client. Subsection a does not apply because the action is not a direct action for punitive damages and Subsection b does not apply because the punitive damages suffered by YOUR client are not the type of damages described in Subsection b.

On the other hand, if YOU cause YOUR client to be subjected to an award of attorney fees, costs, fines, penalties, or other sanctions imposed because of YOUR conduct, or such an award is made against YOU, Subsection b applies and the CLAIM for such damages (or for any related consequential damages) will be excluded.

~~[BUSINESS ACTIVITY EXCLUSIONS]~~

**5. Business Role Exclusion.** This Plan does not apply to that part of any CLAIM based on or arising out of YOUR conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

COMMENTS

A COVERED PARTY, in addition to his or her role as an attorney, may act as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based on such status in a LAW ENTITY.

**6. Business Ownership Interest Exclusion.** This Plan does not apply to any CLAIM ~~by or on behalf of~~ based on or arising out of any business enterprise:

- a. In which YOU have an ownership interest, or in which YOU had an ownership interest at the time of the alleged acts, errors, or omissions on which the CLAIM is based;
- b. In which YOU are a general partner, managing member, or employee, or in which YOU were a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the CLAIM is based; or
- c. That is controlled, operated, or managed by YOU, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by YOU at the time of the alleged acts, errors, or omissions on which the CLAIM is based.

Ownership interest, for the purpose of this exclusion, does not include an ownership interest now or previously held by YOU solely as a passive investment, as long as YOU, those YOU control, YOUR spouse, parent, step-parent, child, step-child, sibling, or any member of YOUR household, and those with whom YOU are regularly engaged in the practice of law, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

COMMENTS

~~Intimacy with a client can increase risk of loss in two ways: (1) The attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arm's length; and (2) After a loss, the attorney may feel particularly motivated to assure the client's recovery. While the PLF is cognizant of a natural desire of attorneys to serve those with whom they are closely connected, the PLF has determined that coverage for such services should be excluded. Exclusion 6 delineates the level of intimacy required to defeat coverage. See also Exclusion 11.~~

7. **Partner and Employee Exclusion.** This Plan does not apply to any CLAIM made by:
- a. YOUR present, former, or prospective partner, employer, or employee; or
  - b. A present, former, or prospective officer, director, or employee of a professional corporation in which YOU are or were a shareholder,

unless such CLAIM arises out of YOUR conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

#### COMMENTS

*The PLF does not always cover YOUR conduct in relation to YOUR past, present, or prospective partners, employers, employees, and fellow shareholders, even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to YOUR conduct in relation to such persons in situations in which YOU are acting as their attorney and they are YOUR client.*

8. **ORPC 1.8 Exclusion.** This Plan does not apply to any CLAIM based on or arising out of any business transaction subject to ORPC 1.8(a) or its equivalent in which YOU participate with a client unless any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC 1 (attached as Exhibit A to this Plan) and has been properly fully executed by YOU and YOUR client prior to the ~~occurrence~~ business transaction giving rise to the CLAIM, ~~and either:~~

~~a. A copy of the executed disclosure form is forwarded to the PLF within 10 calendar days of execution; or~~

~~b. If delivery of a copy of the disclosure form to the PLF within 10 calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, YOU may instead send the PLF an alternative letter stating: (1) the name of the client with whom YOU are participating in a business transaction; (2) that YOU have provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a); (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within 10 calendar days of execution of the disclosure letter.~~

#### COMMENTS

~~**ORPC 1.** Form ORPC 1, referred to above, is attached to this Plan following SECTION XV. The form includes an explanation of ORPC 1.8(a) which should be provided to the client involved in the business transaction.~~

~~———— **Applicability of Exclusion.** When an attorney engages in a business transaction with a client, the attorney has an ethical duty to make certain disclosures to the client. ORPC 1.0(g) and 1.8(a) provide:~~

~~RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES~~

~~—(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:~~

~~———— (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~———— (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~———— (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

~~RULE 1.0(g)~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~This exclusion is not intended to be an interpretation of ORPC 1.8(a). Instead, the Plan is invoking invokes the body of law interpreting ORPC 1.8(a) to define when the exclusion is applicable.~~

~~**Use of the PLF's Form Not Mandated.** Because of the obvious conflict of interest and the high duty placed on attorneys, when the exclusion applies, the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful. Form ORPC 1 is the PLF's attempt to set out an effective disclosure which will provide an adequate defense to such CLAIMS. The PLF is sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use the PLF's proposed form. YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply. Use of the PLF's form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult ORPC 1.0(g) and 1.8(a) and add any disclosures necessary to satisfy the disciplinary rules.~~

~~———— **Timing of Disclosure.** To be effective, it is important that the PLF can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing prior to entering into the transaction is impractical. In those~~

~~circumstances, execution of the disclosure letter after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.~~

~~— **Delivery to the PLF.** Following execution of the disclosure letter, a copy of the letter or an alternative letter must be delivered to the PLF in a timely manner. Failure to do so will result in any subsequent CLAIM against YOU being excluded.~~

~~— **Other Disclosures.** By its terms, ORPC 1.8(a) and this exclusion apply only to business transactions with a client in which the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client. However, lawyers frequently enter into business transactions with others not recognizing that the other expects the lawyer to exercise professional judgment for his or her protection. It can be the "client's" expectation and not the lawyer's recognition that triggers application of ORPC 1.8(a) and this exclusion.~~

~~Whenever YOU enter into a business transaction with a client, former client, or any other person, YOU should make it **clear in writing** at the **start** for YOUR own protection whether or not YOU will also be providing legal services or exercising YOUR professional judgment for the protection of other persons involved in the transaction (or for the business entity itself). Avoiding potential misunderstandings up front can prevent difficult legal malpractice CLAIMS from arising later.~~

9. **Investment Advice Exclusion.** This Plan does not apply to any CLAIM based on or arising out of any act, error, or omission committed by YOU (or by someone for whose conduct YOU are legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by YOU constitutes a COVERED ACTIVITY described in Section III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f, or g of the definition of INVESTMENT ADVICE in Section I.10.

#### COMMENTS

~~In prior years, the PLF suffered extreme losses as a result of COVERED PARTIES engaging in INVESTMENT ADVICE activity. It was never intended that the Plan cover such activities. An INVESTMENT ADVICE exclusion was added to the Plan in 1984. Nevertheless, losses continued in situations where the COVERED PARTY had rendered both INVESTMENT ADVICE and legal advice. In addition, some CLAIMS resulted where the attorney provided INVESTMENT ADVICE in the guise of legal advice.~~

~~Exclusion 9, first introduced in 1987, represented a totally new approach to this problem. Instead of excluding all INVESTMENT ADVICE, the PLF Plan has clearly delineated specific activities which-that will not be covered, whether or not legal as well as INVESTMENT ADVICE is involved. These specific activities are defined in Section I.10 under the definition of INVESTMENT ADVICE. The PLF's choice of delineated activities was guided by specific cases that exposed the PLF in situations never intended to be covered. The PLF is cognizant Plan takes into account that COVERED PARTIES doing structured settlements and COVERED PARTIES in business practice and tax practice legitimately engage in the rendering of general INVESTMENT ADVICE as a part of their practices. In delineating the activities to be excluded, the PLF Plan has attempted to retains coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e., COVERED~~



ACTIVITIES described in Section III.3) when acting in that capacity even though the same activities would not be covered if performed in any other capacity. See the definition of INVESTMENT ADVICE in Section I.10.

Exclusion 9 applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.

~~Note that~~ Exclusion 9 could defeat coverage for an entire CLAIM even if only part of the CLAIM involved INVESTMENT ADVICE. If INVESTMENT ADVICE is in fact either the sole or a contributing cause of any resulting damage that is part of the CLAIM, the entire CLAIM is excluded.

~~[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]~~

**10. Law Practice Business Activities or Benefits Exclusion.** This Plan does not apply to any CLAIM:

- ~~a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, (or by any LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs or expenses were paid, incurred or charged), including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.~~
- ~~b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or~~
- ~~c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.~~

~~In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).~~

~~This exclusion does not apply to any CLAIM based on an act, error or omission by the COVERED PARTY regarding the client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.~~

- ~~a. For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;~~
- ~~b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or~~

~~e. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.~~

## COMMENTS

~~This Plan is intended to cover liability for errors committed in rendering professional services. It is not intended to~~ does not cover liabilities arising out of the business aspects of the practice of law. Here, the Plan clarifies this distinction by excluding liabilities arising out of fee disputes whether the CLAIM seeks a return of a paid fee, cost, or disbursement. Subsection c, in addition, excludes CLAIMS for damages or the recovery of funds or property that, for whatever reason, have resulted or will result in the accrual of a benefit to any COVERED PARTY.

Attorneys sometimes attempt to correct their own mistakes without notifying the PLF. In some cases, the attorneys charge their clients for the time spent in correcting their prior mistakes, which can lead to a later CLAIM from the client. The better course of action is to notify the PLF of a potential CLAIM as soon as it arises and allow the PLF to hire and pay for repair counsel if appropriate. In the PLF's experience, repair counsel is usually more successful in obtaining relief from a court or an opposing party than the attorney who made the mistake. In addition, under Subsection a of this exclusion, the PLF does not cover CLAIMS from a client for recovery of fees previously paid by the client to a COVERED PARTY (including fees charged by an attorney to correct the attorney's prior mistake).

Example No. 1: Attorney A sues Client for unpaid fees; Client counterclaims for the return of fees already paid to Attorney A which allegedly were excessive and negligently incurred by Attorney A. Under Subsection a, there is no coverage for the CLAIM.

Example No. 2: Attorney B allows a default to be taken against Client, and bills an additional \$2,500 in attorney fees incurred by Attorney B in his successful effort to get the default set aside. Client pays the bill, but later sues Attorney B to recover the fees paid. Under Subsection a there is no coverage for the CLAIM.

Example No. 3: Attorney C writes a demand letter to Client for unpaid fees, then files a lawsuit for collection of the fees. Client counterclaims for unlawful debt collection. Under Subsection b, there is no coverage for the CLAIM. The same is true if Client is the plaintiff and sues for unlawful debt collection in response to the demand letter from Attorney C.

Example No. 4: Attorney D negotiates a fee and security agreement with Client on behalf of Attorney D's own firm. Other firm members, not Attorney D, represent Client. Attorney D later leaves the firm, Client disputes the fee and security agreement, and the firm sues Attorney D for negligence in representing the firm. Under Subsection b, there is no coverage for the CLAIM.

Example No. 5: Attorney E takes a security interest in stock belonging to Client as security for fees. Client fails to pay the fees and Attorney E executes on the stock and becomes the owner. Client sues for recovery of the stock and damages. Under Subsection c, there is no coverage for the CLAIM. The same is true if Attorney E receives the stock as a fee and later is sued for recovery of the stock or damages.

**11. Family Member and Ownership Exclusion.** This Plan does not apply to: (a) any CLAIM based ~~upon on~~ or arising out of ~~YOUR~~ legal services performed by YOU on behalf of YOUR ~~on behalf of YOUR~~ spouse, parent, step-parent, child, step-child, sibling, or any member of ~~YOUR YOUR~~ household, or on behalf of a business entity in which any of them, individually or collectively, have a

controlling interest: or (b) any CLAIM against YOU based on or arising out of another lawyer having provided legal services or representation to his or her own spouse, parent, child, step-child, sibling, or any member of his or her household, or on behalf of a business entity in which any of them individually or collectively, have a controlling interest.

#### COMMENT

*Work performed for family members is not covered under this Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise, will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

**12. Benefit Plan Fiduciary Exclusion.** This Plan does not apply to any CLAIM arising out of a COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar plan.

**13. Notary Exclusion.** This Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of YOUR employee and YOU have no actual knowledge of such act.

#### ~~[GOVERNMENT ACTIVITY EXCLUSION]~~

**14. Government Activity Exclusion.** This Plan does not apply to any CLAIM arising out of YOUR conduct:

**a.** As a public official or an employee of a governmental body, subdivision, or agency; or

**b.** In any other capacity that comes within the defense and indemnity requirements of ORS 30.285 and 30.287, or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all YOUR rights against the public body.

#### COMMENTS

~~Subsection a excludes coverage for all public officials and government employees. The term "public official" as used in this section does not include part time city attorneys hired on a contract basis. The term "employee" refers to a salaried person. Thus, the exclusion does not apply, for example, to YOU when YOU are hired on an hourly or contingent fee basis so long as the governmental entity does not provide YOU with office facilities, staff, or other indicia of employment.~~

*Subsection a applies whether or not the public official or employee is entitled to defense or indemnity from the governmental entity. Subsection b, in addition, excludes coverage for YOU in other relationships with a governmental entity, but only if statute, rule, or case law entitles YOU to defense or indemnity from the governmental entity.*

#### ~~[HOUSE COUNSEL EXCLUSION]~~

**15. House Counsel Exclusion.** This Plan does not apply to any CLAIM arising out of YOUR conduct as an employee in an employer-employee relationship other than YOUR conduct as an

employee for a LAW ENTITY.

#### COMMENTS

*This exclusion applies to conduct as an employee even when the employee represents a third party in an attorney-client relationship as part of the employment. Examples of this application include employment by an insurance company, labor organization, member association, or governmental entity that involves representation of the rights of insureds, union or association members, clients of the employer, or the employer itself.*

#### ~~[GENERAL TORTIOUS CONDUCT EXCLUSIONS]~~

**16. General Tortious Conduct Exclusions.** This Plan does not apply to any CLAIM against any COVERED PARTY for:

- a. Bodily injury, sickness, disease, or death of any person;
- b. Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise COVERED ACTIVITY.

#### COMMENTS

~~*The CLAIMS excluded are not typical errors and omissions torts and are, therefore, considered inappropriate for coverage under the Plan. YOU are encouraged to seek coverage for these CLAIMS through commercial insurance markets.*~~

~~*Prior to 1991 the Plan expressly excluded "personal injury" and "advertising injury," defining those terms in a manner similar to their definitions in standard commercial general liability policies. The deletion of these defined terms from this Exclusion is not intended to imply that all personal injury and advertising injury CLAIMS are covered. Instead, the deletion is intended only to permit coverage for personal injury or advertising injury CLAIMS, if any, that fall within the other coverage terms of the Plan.*~~

*Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, money etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney's performance of professional services, in which event the consequential damages resulting from the loss or damage to property would be covered. For the purposes of this Comment, "consequential damages" means the extent to which the attorney's professional services are adversely affected by the property damage or loss.*

*Example No. 1: Client gives Attorney A valuable jewelry to hold for safekeeping. The jewelry is*

stolen or lost. There is no coverage for the value of the stolen or lost jewelry, since the loss of the property did not adversely affect the performance of professional services. Attorney A can obtain appropriate coverage for such losses from commercial insurance sources.

Example No. 2: Client gives Attorney B a defective ladder from which Client fell. The ladder is evidence in the personal injury case Attorney B is handling for Client. Attorney B loses the ladder. Because the ladder is lost, Client loses the personal injury case. The CLAIM for the loss of the personal injury case is covered. The damages are the difference in the outcome of the personal injury case caused by the loss of the ladder. There would be no coverage for the loss of the value of the ladder. Coverage for the value of the ladder can be obtained through commercial insurance sources.

Example No. 3: Client gives Attorney C important documents relevant to a legal matter being handled by Attorney C for Client. After the conclusion of handling of the legal matter, the documents are lost or destroyed. Client makes a CLAIM for loss of the documents, reconstruction costs, and consequential damages due to future inability to use the documents. There is no coverage for this CLAIM, as loss of the documents did not adversely affect any professional services because the professional services had been completed. Again, coverage for loss of the property (documents) itself can be obtained through commercial general liability or other insurance or through a valuable papers endorsement to such coverage.

~~**Child Abuse Reporting Statute.** This exclusion would ordinarily exclude coverage for the type of damages that might be alleged against an attorney for failure to comply with ORS 419B.010, the child abuse reporting statute. (It is presently uncertain whether civil liability can arise under the statute.) If there is otherwise coverage under this Plan for a CLAIM arising under ORS 419B.010, the PLF will not apply Exclusion 16 to the CLAIM.~~

17. **Unlawful Harassment and Discrimination Exclusion.** This Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual ~~preference~~orientation, disability, pregnancy, national origin, marital status, or any other basis ~~prohibited by law.~~

#### COMMENTS

The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, ~~inappropriate for coverage~~not covered under the Plan.

~~[PATENT EXCLUSION]~~

18. **Patent Exclusion.** This Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error, or omission committed in relation to the prosecution of a patent if YOU were not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

19. *Reserved.*

~~———— [CONTRACTUAL OBLIGATION EXCLUSION]~~

20. **Contractual Obligation Exclusion.** This Plan does not apply to any CLAIM:

- a. Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by YOU or someone for whose conduct YOU are legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;
- b. Any costs connected to ORS 20.160 or similar statute or rule;
- c. For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or
- d. Claims in contract based upon an alleged promise to obtain a certain outcome or result.

### COMMENTS

*In the Plan, the PLF agrees to assume certain tort risks of Oregon attorneys for certain errors or omissions in the private practice of law; it does not assume the risk of making good on attorneys' contractual obligations. So, for example, an agreement to indemnify or guarantee an obligation will generally not be covered, except in the limited circumstances described in Subsection a. That subsection is discussed further below in this Comment.*

*Subsection b, while involving a statutory rather than contractual obligation, nevertheless expresses a similar concept, since under ORS 20.160 an attorney who represents a nonresident or foreign corporation plaintiff in essence agrees to guarantee payment of litigation costs not paid by his or her client.*

*Subsection c states the general rule that contractual liabilities are not covered under the PLF Plan. For example, an attorney who places an attorney fee provision in his or her retainer agreement voluntarily accepts the risk of making good on that contractual obligation. Because a client's attorney fees incurred in litigating a dispute with its attorney are not ordinarily damages recoverable in tort, they are not a risk the PLF agrees to assume. In addition, if a Covered Party agrees or represents that he or she will pay a claim, reduce fees, or the like, a claim based on a breach of that agreement or representation will not be covered under the Plan.*

*Subsection d involves a specific type of agreement or representation: an alleged promise to obtain a particular outcome or result. One example of this would be an attorney who promises to get a case reinstated or to obtain a particular favorable result at trial or in settlement. In that situation, the attorney can potentially be held liable for breach of contract or misrepresentation regardless of whether his or her conduct met the standard of care. That situation is to be distinguished from an attorney's liability in tort or under the third party beneficiary doctrine for failure to perform a particular task, such as naming a particular beneficiary in a will or filing and serving a complaint within the statute of limitations, where the liability, if any, is not based solely on a breach of the attorney's guarantee, promise or representation.*

*Attorneys sometimes act in one of the special capacities for which coverage is provided under Section III.3 (i.e., as a named personal representative, administrator, conservator, executor, guardian, or trustee except BUSINESS TRUSTEE). If the attorney is required to sign a bond or any surety, guaranty, warranty, joint control, or similar agreement while carrying out one of these special capacities, Exclusion 20.a does not apply, although b, c, or d of this Exclusion may be applicable.*

*On the other hand, when an attorney is acting in an ordinary capacity not within the provisions of Section III.3, Exclusion 20 does apply to any CLAIM based on or arising out of any bond or any surety, guaranty, warranty, joint control, indemnification, or similar agreement signed by the attorney or by someone for whom the attorney is legally liable. In these situations, attorneys should not sign such bonds or agreements. For example, if an attorney is acting as counsel to a personal representative and the personal representative is required to post a bond, the attorney should resist any attempt by the bonding company to require the attorney to co-sign as a surety for the personal representative or to enter into a joint control or similar agreement that requires the attorney to review, approve, or control expenditures by the personal representative. If the attorney signs such an agreement and a CLAIM is later made by the bonding company, the estate, or another party, Exclusion 20 applies and there will be no coverage for the CLAIM.*

~~[BANKRUPTCY TRUSTEE EXCLUSION]~~

**21. Bankruptcy Trustee Exclusion.** This Plan does not apply to any CLAIM arising out of YOUR activity (or the activity of someone for whose conduct ~~you~~ YOU are legally liable) as a bankruptcy trustee.

~~[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]~~

**22. Confidential or Private Data Exclusion.** This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

COMMENTS

*There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a ~~Covered Party~~ COVERED PARTY; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a ~~Covered Party~~ COVERED PARTY or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.*

*There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.*

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**SECTION VI — LIMITS OF COVERAGE AND  
CLAIMS EXPENSE ALLOWANCE**

## 1. Limits for This Plan

**a. Coverage Limits.** The PLF's maximum liability under this Plan is \$300,000 DAMAGES and EXCESS CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the PLF's Limit of Coverage.

**b. Claims Expense Allowance Limits.** In addition to the Limit of Coverage stated in Section VI.1.a above, there is a single CLAIMS EXPENSE ALLOWANCE of \$50,000 for CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the CLAIMS EXPENSE ALLOWANCE. In the event CLAIMS EXPENSE exceeds the CLAIMS EXPENSE ALLOWANCE, the Limit of Coverage will be reduced by the amount of EXCESS CLAIMS EXPENSE incurred. The CLAIMS EXPENSE ALLOWANCE is not available to pay DAMAGES or settlements.

**c. No Consequential Damages.** No person or entity may recover any damages for breach of any provision in this Plan except those specifically provided for in this Plan.

## 2. Limits Involving Same or Related Claims Under Multiple Plans

If this Plan and one or more other Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, or LAW ENTITIES involved, only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE will apply. Notwithstanding the preceding sentence, if the SAME OR RELATED CLAIMS are brought against two or more separate LAW ENTITIES, each of which requests and is entitled to separate defense counsel, the PLF will make one CLAIMS EXPENSE ALLOWANCE available to each of the separate LAW ENTITIES requesting a separate allowance. For purposes of this provision, whether LAW ENTITIES are separate is determined as of the time of the COVERED ACTIVITIES that are alleged in the CLAIMS. No LAW ENTITY, or group of LAW ENTITIES practicing together as a single firm, will be entitled to more than one CLAIMS EXPENSE ALLOWANCE under this provision. The CLAIMS EXPENSE ALLOWANCE granted will be available solely for the defense of the LAW ENTITY requesting it.

### COMMENTS

*This Plan is intended to provide a basic "floor" level of coverage for all Oregon attorneys engaged in the private practice of law whose principal offices are in Oregon. Because of this, there is a general prohibition against the stacking of either Limits of Coverage or CLAIMS EXPENSE ALLOWANCES. Except for the provision involving CLAIMS EXPENSE ALLOWANCES under Subsection 2, only one Limit of Coverage and CLAIMS EXPENSE ALLOWANCE will ever be paid under any one Plan issued to a COVERED PARTY in any one PLAN YEAR, regardless of the circumstances. Limits of Coverage or CLAIMS EXPENSE ALLOWANCES in multiple individual Plans do not stack for any CLAIMS that are "related." As the definition of SAME OR RELATED CLAIMS and its Comments and Examples demonstrate, the term "related" has a broad meaning when determining the number of Limits of Coverage and CLAIMS EXPENSE ALLOWANCES potentially available. This broad definition is designed to ensure the long-term economic viability of*



the PLF by protecting it from multiple limits exposures, ensuring fairness for all Oregon attorneys who are paying annual assessments, and keeping the overall coverage affordable.

~~The Plan grants a limited exception to the one-limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the Plan allows for a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.~~

~~Anti-stacking provisions in the PLF Plan may create hardships for particular COVERED PARTIES who do not purchase excess coverage. Excess coverage provides coverage to -COVERED PARTIES who represent clients in situations in which single or multiple CLAIMS could result in exposure beyond one Limit of Coverage -should purchase excess professional liability coverage.~~

~~Effective January 1, 2005, the PLF has created a limited exception to the one limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the PLF will allow a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.~~

The coverage provisions and limitations provided in this Plan are the absolute maximum amounts that can be recovered under the Plan. Therefore, no person or party is entitled to recover any consequential damages for breach of the Plan.

Example No. 1: Attorney A performed COVERED ACTIVITIES for a client while Attorney A was at two different law firms. Client sues A and both firms. Both firms request separate counsel, each one contending most of the alleged errors took place while A was at the other firm. The defendants are collectively entitled to a maximum of one \$300,000 Limit of Coverage and two CLAIMS EXPENSE ALLOWANCES. For purposes of this provision, Attorney A (or, if applicable, her professional corporation) is not a separate LAW ENTITY from the firm at which she worked. Accordingly, two, not three, CLAIMS EXPENSE ALLOWANCES are potentially available.

Example No. 2: Attorney A is a sole practitioner, practicing as an LLC, but also working of counsel for a partnership of B and C. While working of counsel, A undertook a case which he concluded involved special issues requiring the expertise of Attorney D, from another firm. D and C work together in representing the client and commit errors in handling the case. Two CLAIMS EXPENSE ALLOWANCES are potentially available. There are only two separate firms – the BC partnership and D’s firm.

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## SECTION VII — NOTICE OF CLAIMS

1. The COVERED PARTY must, as a condition precedent to the right of protection afforded by this coverage, give the PLF, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY. In the event a SUIT is brought against the COVERED PARTY, the COVERED PARTY must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.

2. If the COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Plan, the COVERED PARTY must give written notice to the PLF as soon as practicable during the COVERAGE

PERIOD of:

- a. The specific act, error, or omission;
- b. DAMAGES and any other injury that has resulted or may result; and
- c. The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.

3. If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

#### COMMENTS

*This is a Claims Made Plan. Section IV.1.b determines when a CLAIM is first made for the purpose of triggering coverage under this Plan. Section VII states the COVERED PARTY'S obligation to provide the PLF with prompt notice of CLAIMS, SUITS, and potential CLAIMS.*

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### SECTION VIII — COVERAGE DETERMINATIONS

1. This Plan is governed by the laws of the State of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Plan. Any disputes as to the applicability, interpretation, or enforceability of this Plan, or any other issue pertaining to the provision of benefits under this Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the State of Oregon which will have exclusive jurisdiction and venue of such disputes at the trial level.

2. The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.

3. In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that this Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

4. The bankruptcy or insolvency of a COVERED PARTY does not relieve the PLF of its obligations under this Plan.

#### COMMENTS

~~Historically, Section VIII provided for resolution of coverage disputes by arbitration. After 25~~

~~years of resolving disputes in this manner, the PLF concluded it would be more beneficial to YOU and the PLF to try these matters to a court where appeals are available and precedent can be established.~~

~~In the event of a dispute over coverage, Until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute until the coverage dispute is concluded.~~ The PLF recognizes there may occasionally be exceptional circumstances making a coverage determination impracticable prior to a payment by the PLF of a portion or all of the PLF's Limit of Coverage toward resolution of a CLAIM. For example, a claimant may make a settlement demand having a deadline for acceptance that would expire before coverage could be determined, or a court might determine on the facts before it that a binding determination on the relevant coverage issue should not be made while the CLAIM is pending. In some of these exceptional circumstances, the PLF may at its option pay a portion or all of the Limit of Coverage before the dispute concerning the question of whether this Plan is applicable to the CLAIM is decided. If the PLF pays a portion or all of the Limit of Coverage and the court subsequently determines that this Plan is not applicable to the CLAIM, then the COVERED PARTY or others on whose behalf the payment was made must reimburse the PLF, in order to prevent unjust enrichment and protect the solvency and financial integrity of the PLF. For a COVERED PARTY'S duties in this situation, see Section IX.3.

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## SECTION IX — ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

1. As a condition of coverage under this Plan, the COVERED PARTY will, without charge to the PLF, cooperate with the PLF and will:

- a. Provide to the PLF, within 30 days after written request, sworn statements providing full disclosure concerning any CLAIM or any aspect thereof;
- b. Attend and testify when requested by the PLF;
- c. Furnish to the PLF, within 30 days after written request, all files, records, papers, and documents that may relate to any CLAIM against the COVERED PARTY;
- d. Execute authorizations, documents, papers, loan receipts, releases, or waivers when so requested by the PLF;
- e. Submit to arbitration of any CLAIM when requested by the PLF;
- f. Permit the PLF to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense, and settlement of all CLAIMS;
- g. Not communicate with any person other than the PLF or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without the PLF's written consent;
- h. Assist, cooperate, and communicate with the PLF in any other way necessary to investigate, defend, repair, settle, or otherwise resolve any CLAIM against the COVERED PARTY.

2. To the extent the PLF makes any payment under this Plan, it will be subrogated to any

COVERED PARTY's rights against third parties to recover all or part of these sums. When requested, every COVERED PARTY must assist the PLF in bringing any subrogation or similar claim. The PLF's subrogation or similar rights will not be asserted against any non-attorney employee of YOURS or YOUR law firm except for CLAIMS arising from intentional, dishonest, fraudulent, or malicious conduct of such person.

3. The COVERED PARTY may not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense with respect to a CLAIM.

4. In the event the PLF proposes in writing a settlement to be funded by the PLF but subject to the COVERED PARTY's being obligated to reimburse the PLF if it is later determined that the Plan did not cover all or part of the CLAIM settled, the COVERED PARTY must advise the PLF in writing that the COVERED PARTY:

- a. Agrees to the PLF's proposal, or
- b. Objects to the PLF's proposal.

The written response must be made by the COVERED PARTY as soon as practicable and, in any event, must be received by the PLF no later than one business day (and at least 24 hours) before the expiration of any time-limited demand for settlement. A failure to respond, or a response that fails to unequivocally object to the PLF's written proposal, constitutes an agreement to the PLF's proposal. A response objecting to the settlement relieves the PLF of any duty to settle that might otherwise exist.

#### COMMENTS

*Subsection 4 addresses a problem that arises only when the determination of coverage prior to trial or settlement of the underlying claim is impracticable either because litigation of the coverage issue is not possible, permissible, or advisable, or because a pending trial date or time limit demand presents too short a period for resolution of the coverage issue prior to settlement or trial. In these circumstances, to avoid any argument that the PLF is acting as a volunteer, the PLF needs specific advice from the COVERED PARTY (or anyone claiming through the COVERED PARTY) either unequivocally agreeing that the PLF may proceed with the proposed settlement (i.e., waiving the volunteer argument) or unequivocally objecting to the proposed settlement (i.e., waiving any right to contend that the PLF has a duty to settle). ~~While the PLF recognizes the requirement of an unequivocal response in some circumstances forces the COVERED PARTY (or anyone claiming through the COVERED PARTY) to make a difficult judgment,~~ The exigencies of the situation require an unequivocal response so the PLF will know whether it can proceed with settlement without forfeiting its right to reimbursement to the extent the CLAIM is not covered.*

~~*The obligations of the Covered Party under Section IX as well as the other Sections of the Plan are to be performed without charge to the PLF.*~~

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#### SECTION X — ACTIONS BETWEEN THE PLF AND COVERED PARTIES

1. No legal action in connection with this Plan will be brought against the PLF unless the COVERED PARTY has fully complied with all terms of this Plan.

2. The PLF may bring legal action in connection with this Plan against a COVERED PARTY if:

- a. The PLF pays a CLAIM under another Plan issued by the PLF;
- b. A COVERED PARTY under this Plan is alleged to be liable for all or part of the damages paid by the PLF;
- c. As between the COVERED PARTY under this Plan and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY under this Plan for contribution, indemnity, or otherwise, for all or part of the damages paid; and
- d. Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Plan.

3. In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate, up to the full amount the PLF has paid under one or more other Plans issued by the PLF. However, this Subsection will not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery that would entitle the COVERED PARTY to indemnity under this Plan if the PLF's action were successful.

#### COMMENTS

*Under certain circumstances, a CLAIM against YOU may not be covered because of an exclusion or other applicable provision of the Plan issued to YOU. However, in some cases the PLF may be required to pay the CLAIM nonetheless because of the PLF's obligation to another COVERED PARTY under the terms of his or her Plan. This might occur, for example, when YOU are the attorney responsible for a CLAIM and YOU have no coverage due to YOUR intentional or wrongful conduct, but YOUR partner did not engage in or know of YOUR wrongful conduct but is nevertheless allegedly liable. In these circumstances, if the PLF pays some or all of the CLAIM arising from YOUR conduct ~~it is fair that~~ the PLF ~~has the right to may~~ seek recovery back from YOU; otherwise, the PLF would effectively be covering YOUR non-covered CLAIMS simply because other COVERED PARTIES were vicariously liable.*

*Example No. 1: Attorney A misappropriates trust account funds belonging to Client X. Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the CLAIM under his Plan, but Attorney B has coverage for her liability under her Plan. The PLF pays the CLAIM under Attorney B's Plan. Section X.2 of Attorney A's Plan makes clear the PLF has the right to sue Attorney A for the damages the PLF paid under Attorney B's Plan.*

*Example No. 2: Same facts as the prior example, except that the PLF loans funds to Attorney B under terms that obligate Attorney B to repay the loan to the extent she recovers damages from Attorney A in an action for indemnity. Section X.2 of Attorney A's Plan makes clear that the PLF has the right pursuant to such arrangement with Attorney B to participate in her action against Attorney A.*

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#### SECTION XI — SUPPLEMENTAL ASSESSMENTS

This Claims Made Plan is assessable. Each PLAN YEAR is accounted for and assessable using

reasonable accounting standards and methods of assessment. If the PLF determines that a supplemental assessment is necessary to pay for CLAIMS, CLAIMS EXPENSE, or other expenses arising from or incurred during either this PLAN YEAR or a previous PLAN YEAR, YOU agree to pay YOUR supplemental assessment to the PLF within 30 days of request.

The PLF is authorized to make additional assessments against YOU for this PLAN YEAR until all the PLF's liability for this PLAN YEAR is terminated, whether or not YOU are a COVERED PARTY under a Plan issued by the PLF at the time the assessment is imposed.

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## SECTION XII — RELATION OF PLF COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE

If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify that also applies to any loss or CLAIM covered by this Plan, the PLF will not be liable under the Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage of this Plan.

### COMMENTS

*As explained in the Preface, this Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under Lamb-Weston v. Oregon Automobile Ins. Co. 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## SECTION XIII — WAIVER AND ESTOPPEL

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Plan nor will the terms of this Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## SECTION XIV — AUTOMATIC EXTENDED CLAIMS REPORTING PERIOD

1. If YOU:
  - a. Terminate YOUR PLF coverage during the PLAN YEAR, or
  - b. Do not obtain PLF coverage as of the first day of the next PLAN YEAR,

YOU will automatically be granted an extended reporting period for this Plan at no additional cost. The extended reporting period will commence on the day after YOUR last day of PLF coverage and will continue until the expiration of the time allowed for any CLAIM to be made against YOU or any other COVERED PARTY listed in SECTION II of this Plan, or the date specified in Subsection 2, whichever date is earlier. Any extension granted under this Subsection will not increase the CLAIMS EXPENSE

ALLOWANCE or the Limits of Coverage available under this Plan, nor provide coverage for YOUR activities which occur after YOUR last day of PLF coverage.

2. If YOU terminate YOUR PLF coverage during this PLAN YEAR and return to PLF coverage later in this same PLAN YEAR:

- a. The extended reporting period granted to YOU under Subsection 1 will automatically terminate as of the date YOU return to PLF coverage;
- b. The coverage provided under this Plan will be reactivated; and
- c. YOU will not receive a new Limit of Coverage or CLAIMS EXPENSE ALLOWANCE on YOUR return to coverage.

#### COMMENTS

~~Subsection 1 sets forth YOUR right to extend the reporting period in which a CLAIM must be made. The granting of YOUR rights hereunder an extended reporting period does not establish a new or increased CLAIMS EXPENSE ALLOWANCE or Limits of Coverage, but instead merely extends the reporting period under this Plan which will apply to all covered CLAIMS made against YOU during the extended reporting period. The terms and conditions of this Plan will continue to apply to all CLAIMS that may be made against YOU during the extended reporting period. This extended CLAIMS reporting period is subject to other limitations and requirements, which are available from the PLF on request.~~

Attorneys with PLF coverage who leave the private practice of law in Oregon during the PLAN YEAR are permitted to terminate their coverage mid-year and seek a prorated refund of their annual assessment under PLF Policy 3.400. Attorneys who do so will receive extended reporting coverage under this section effective as of the day following their last day of PLF coverage. For attorneys who engage in the private practice of law in Oregon through the end of the current PLAN YEAR but do not obtain PLF coverage at the start of the next PLAN YEAR, their extended reporting coverage begins on the first day after the current PLAN YEAR.

Example No. 1: Attorney A obtains regular PLF coverage in 2010 with a CLAIMS EXPENSE ALLOWANCE of \$50,000 and Limits of Coverage of \$300,000. One CLAIM is asserted in 2010 for which a total of \$200,000 is paid in indemnity and expense (including the entire \$50,000 CLAIMS EXPENSE ALLOWANCE). The remaining Limits of Coverage under the 2010 Plan are \$150,000. Attorney A leaves the private practice of law on December 31, 2010 and obtains extended reporting coverage at no charge. The 2010 Plan will apply to all CLAIMS made in 2011 or later years, and only \$150,000 in Limits of Coverage (the balance left under Attorney A's 2010 Plan) is-are available for all CLAIMS made in 2011 or later years. There is no remaining CLAIMS EXPENSE ALLOWANCE for any new CLAIMS.

Example No. 2: Attorney B obtains regular PLF coverage in 2010, but leaves private practice on March 31, 2010 and obtains a prorated refund of her 2010 assessment. Attorney B will automatically obtain extended reporting coverage under her 2010 Plan as of April 1, 2010. Attorney B returns to PLF coverage on October 1, 2010. Her extended reporting coverage terminates as of that date, and she will not receive new Limits of Coverage or CLAIMS EXPENSE ALLOWANCE. If a CLAIM is made against her in November 2010, her 2010 Plan will cover the CLAIM whether it arises from an alleged error occurring before April 1, 2010 or on or after October 1, 2010.

## SECTION XV — ASSIGNMENT

The interest hereunder of any COVERED PARTY is not assignable.



EXHIBIT A — FORM ORPC 1

Dear ~~[Client]~~:

~~This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.~~

~~The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, **include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable.**~~

~~Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.~~

~~I enclose an article "Business Deals Can Cause Problems," which contains additional information. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.~~

~~Very truly yours,~~

~~[Attorney Name and Signature]~~

~~I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:~~

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
~~[Client's Signature] \_\_\_\_\_ [Date]~~

~~Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.~~

~~**BUSINESS DEALS CAN CAUSE PROBLEMS** (Complying With ORPC 1.8(a))~~

~~By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar~~

~~Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.~~

~~ORPC 1.8(a) and 1.0(g) read as follows:~~

~~*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*~~

~~(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:~~

~~(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

~~*ORPC 1.0 Terminology*~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.~~

~~A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.~~

~~Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.~~

~~Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.~~

~~In order to avoid the ethical problems addressed by the conflict-of-interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.~~

20165

PLF Claims Made Excess Plan

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# OREGON STATE BAR PROFESSIONAL LIABILITY FUND

## CLAIMS MADE EXCESS PLAN

Effective January 1, 201~~6~~5

### THIS IS A CLAIMS MADE EXCESS PLAN – PLEASE READ CAREFULLY

#### NOTICE

**THIS EXCESS PLAN IS WRITTEN AS SPECIFIC EXCESS COVERAGE TO THE PLF CLAIMS MADE PLAN AND CONTAINS PROVISIONS MORE RESTRICTIVE THAN THE COVERAGE AFFORDED BY THE PLF CLAIMS MADE PLAN. THIS EXCESS PLAN CONTAINS PROVISIONS THAT REDUCE THE LIMITS OF COVERAGE BY THE COSTS OF LEGAL DEFENSE. THIS EXCESS PLAN IS ASSESSABLE.**

Various provisions in this Excess Plan restrict coverage. Read the entire Excess Plan to determine rights, duties and what is and is not covered.

#### INTERPRETATION OF THIS EXCESS PLAN

~~**Bracketed Titles.** The bracketed titles appearing throughout this Excess Plan are not part of the Excess Plan and should not be used as an aid in interpreting the Excess Plan. The bracketed titles are intended simply as a guide to aid the reader in locating pertinent provisions.~~

**Plan Comments.** In contrast, the discussions labeled "COMMENTS" following various provisions of this Excess Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of this Excess Plan.

**Use of Capitals.** Capitalized terms are defined in Section I of this Excess Plan and the PLF CLAIMS MADE PLAN. ~~The definition of COVERED PARTY appearing in Section II and the definition of COVERED ACTIVITY appearing in Section III are particularly crucial to the understanding of the coverage grant.~~

#### COMMENTS

**History.** *Through the issuance of separate PLF PLANS to each individual attorney, the PLF provides primary malpractice coverage to all attorneys engaged in the private practice of law in Oregon. This Excess Plan was created pursuant to enabling legislation empowering the Board of Governors of the Oregon State Bar to establish an optional, underwritten program of excess malpractice coverage through the PLF for those attorneys and firms which want higher coverage limits. See ORS 9.080 (2) (a) and its legislative history. The PLF has been empowered to do whatever is necessary and convenient to achieve*

*this objective. See, e.g., Balderree v. Oregon State Bar, 301 Or 155, 719 P2d 1300 (1986). Pursuant to this authority, the PLF has adopted this Excess Plan.*

**Claims Made Form.** *This Excess Plan is a claims made coverage plan. This Excess Plan is a contractual agreement between the PLF and THE FIRM.*

**Interpretation of the Excess Plan.** *This Excess Plan is to be interpreted throughout in a manner consistent with the interpretation of the PLF CLAIMS MADE PLAN.*

Accordingly, Comments to language in the PLF PLAN apply to similar language in this Excess Plan.

~~**Purpose of Comments.**—These Comments are similar in form to the UCC and Restatements. They are intended to aid in the construction of the language of this Excess Plan. By the addition of these Comments, the PLF hopes to avoid the existence of any ambiguities, to assist attorneys in interpreting the coverage available to them, and to provide a specific basis for interpretation.~~

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## SECTION I – DEFINITIONS

**1.** Throughout this Excess Plan, the following terms, when appearing in capital letters, mean the same as their definitions in the PLF CLAIMS MADE PLAN:

- a. PLF
- b. SUIT
- c. CLAIM
- d. SAME OR RELATED CLAIMS
- e. DAMAGES
- f. BUSINESS TRUSTEE
- g. CLAIMS EXPENSE
- h. COVERAGE PERIOD
- i. INVESTMENT ADVICE
- j. LAW ENTITY

**2.** Throughout this Excess Plan, when appearing in capital letters:

**a.** The words “THE FIRM” refer to the law entities designated in Sections 1 and 11 of the Declarations.

**b.** “COVERED PARTY” means any person or organization qualifying as such under Section II – WHO IS A COVERED PARTY.

**c.** “COVERED ACTIVITY” means conduct qualifying as such under Section III -- WHAT IS A COVERED ACTIVITY.

**d.** “PLAN YEAR” means the period January 1 through December 31 of the calendar year for which this Excess Plan was issued.

**e.** The words "PLF CLAIMS MADE PLAN" or "PLF PLAN" refer to the PLF Claims Made Plan issued by the PLF as primary coverage for the PLAN YEAR.

**f.** The words "APPLICABLE UNDERLYING LIMIT" mean the aggregate total of (1) the amount of the coverage afforded by the applicable PLF PLANS issued to all persons qualifying as COVERED PARTIES under the terms of this Excess Plan, plus (2) the amount of any other coverage available to any COVERED PARTY with respect to the CLAIM for which coverage is sought.

**g.** "FIRM ATTORNEY" means an attorney listed in Section 10 of the Declarations.

**h.** "FORMER ATTORNEY" means an attorney listed in Section 12 of the Declarations.

**i.** "NON-OREGON ATTORNEY" means an attorney listed in Section 14 or 15 of the Declarations.

**j.** "EXCLUDED ATTORNEY" means an attorney listed in Section 16 of the Declarations.

**k.** "EXCLUDED FIRM" means a LAW ENTITY listed in Section 17 of the Declarations.

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## SECTION II – WHO IS A COVERED PARTY

The following are COVERED PARTIES:

**1.** THE FIRM, except that THE FIRM is not a COVERED PARTY with respect to liability arising out of conduct of an attorney who was affiliated in any way with THE FIRM at any time during the five years prior to the beginning of the COVERAGE PERIOD but is not listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations.

**2.** Any person listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM.

**3.** Any former partner, shareholder, member, or attorney employee of THE FIRM, or any person formerly in an "of counsel" relationship to THE FIRM, who ceased to be affiliated in any way with THE FIRM more than five years prior to the beginning of the COVERAGE PERIOD, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM and only for COVERED ACTIVITIES that took place while a PLF CLAIMS MADE PLAN issued to that person was in effect.

**4.** In the event of death, adjudicated incapacity, or bankruptcy, the conservator, guardian, trustee in bankruptcy, or legal or personal representative of any COVERED PARTY listed in Subsections 1 to 3 but only to the extent that such COVERED PARTY would otherwise be provided coverage under this Excess Plan.

**5.** Any attorney who becomes affiliated with THE FIRM after the beginning of the COVERAGE PERIOD who has been issued a PLF PLAN by the PLF, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM. However, newly affiliated attorneys are not automatically COVERED PARTIES under this Subsection if: (a) the number of FIRM ATTORNEYS increases by more than 100 percent; (b) there is a firm merger or split; (c) an attorney joins or leaves a branch office of THE FIRM outside Oregon; (d) a new branch office is established outside Oregon; (e) THE FIRM or a current attorney with THE FIRM enters into an "of counsel" relationship with another firm or with an attorney who was not listed as a current attorney at the start of the COVERAGE PERIOD; or (f) THE FIRM hires an attorney who is not eligible to participate in the PLF's CLAIMS MADE PLAN.

*COMMENTS*



*Firms are generally not required to notify the PLF if an attorney joins or leaves THE FIRM after the start of the COVERAGE PERIOD, and are neither charged a prorated excess assessment nor receive a prorated refund for such changes. New attorneys who join after the start of the COVERAGE PERIOD are covered for their actions on behalf of THE FIRM during the remainder of the year. All changes after the start of the COVERAGE PERIOD should be reported to the PLF in THE FIRM'S renewal application for the next year.*

*Firms are required to notify the PLF after the start of the COVERAGE PERIOD, however, if any of the six circumstances listed in Subsection 5 apply. Under these circumstances, THE FIRM'S coverage will be subject again to underwriting, and a prorated adjustment may be made to THE FIRM'S excess assessment.*

*Please note also that FIRM ATTORNEYS, FORMER ATTORNEYS, and NON-OREGON ATTORNEYS have coverage under this Excess Plan only for CLAIMS which arise out of work performed for THE FIRM. For example, there is no coverage for CLAIMS which arise out of work performed for another firm before an attorney began working for THE FIRM; the attorney will have coverage, if at all, only under any Excess Plan or policy maintained by the other firm.*

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## SECTION III – WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES:

### ~~[COVERED PARTY'S CONDUCT]~~

1. **Covered Party's Conduct.** Any act, error, or omission by an attorney COVERED PARTY in the performance of professional services in the COVERED PARTY'S capacity as an attorney in private practice, as long as the act, error, or omission was rendered on behalf of THE FIRM and occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations.

### ~~[CONDUCT OF OTHERS]~~

2. **Conduct of Others.** Any act, error, or omission by a person, other than an EXCLUDED ATTORNEY, for whose conduct an attorney COVERED PARTY is legally liable in the COVERED PARTY'S capacity as an attorney for THE FIRM provided each of the following criteria is satisfied:

a. The act, error, or omission causing the attorney COVERED PARTY'S liability occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations;

b. The act, error, or omission, if committed by the attorney COVERED PARTY, would constitute the providing of professional services in the attorney COVERED PARTY'S capacity as an attorney in private practice; and

c. The act, error, or omission was not committed by an attorney who either (1) was affiliated in any way with THE FIRM during the five years prior to the COVERAGE PERIOD but was not listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations; or (2) ceased to be affiliated with THE FIRM more than five years prior to the beginning of the COVERAGE PERIOD but was not covered by a PLF CLAIMS MADE PLAN at the time of the act, error, or omission.

~~[COVERED PARTY'S CONDUCT IN A SPECIAL CAPACITY]~~

**3. Covered Party's Conduct in a Special Capacity.** Any act, error, or omission by an attorney COVERED PARTY in his or her capacity as a personal representative, administrator, conservator, executor, guardian, special representative pursuant to ORS 128.179 or similar statute, or trustee (except BUSINESS TRUSTEE); provided that the act, error, or omission arose out of a COVERED ACTIVITY as defined in Subsections 1 and 2 above; the CLAIM is brought by or for the benefit of a beneficiary of the special capacity relationship and arises out of a breach of that relationship; and such activity occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations.

*COMMENTS*

*To qualify for coverage a claim must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage. For additional Comments and examples discussing this requirement, see the Comments to Section III in the PLF CLAIMS MADE PLAN.*

***Retroactive Date.*** This Section introduces the concept of a Retroactive Date. If a Retroactive Date applies to a CLAIM to place it outside the definition of a COVERED ACTIVITY, there will be no coverage for the CLAIM under this Excess Plan as to any COVERED PARTY, even for vicarious liability.

***Example:*** Attorneys A and B practice as partners and apply for excess coverage from the PLF for Year 1. A has had several recent large claims arising from an inadequate docket control system, but implemented an adequate system on July 1 of the previous year. For underwriting reasons, the PLF decides to offer coverage to the firm under this Excess Plan with a Retroactive Date of July 1 of the previous year. A CLAIM is made against Attorney A, Attorney B, and the firm during Year 1 arising from conduct of Attorney A occurring prior to July 1 of the previous year. Because the conduct in question occurred prior to the firm's Retroactive Date under this Excess Plan, the CLAIM does not fall within the definition of a COVERED ACTIVITY and there is no coverage for the CLAIM for Attorney A, B, or the firm.

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## SECTION IV – GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums in excess of any APPLICABLE UNDERLYING LIMITS or applicable Deductible that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Excess Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 – Defense.

**b.** This Excess Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD, except as provided in this Subsection. A CLAIM will be deemed to have been first made at the time it would be deemed first made under the terms of the PLF PLAN. Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time they are deemed first made under the terms of the applicable PLF PLAN; provided, however, that a CLAIM that is asserted against a COVERED PARTY during the COVERAGE PERIOD will not relate back to a previous SAME OR RELATED CLAIM if prior to the COVERAGE PERIOD (1) none of the SAME OR

RELATED CLAIMS were made against any COVERED PARTY in this Excess Plan and (2) no COVERED PARTY had knowledge of any facts reasonably indicating that any CLAIM could or would be made in the future against any COVERED PARTY.

c. This Excess Plan applies only if the COVERED ACTIVITY giving rise to the CLAIM happens:

(1) During the COVERAGE PERIOD, or

(2) Prior to the COVERAGE PERIOD, provided that both of the following conditions are met:

(a) Prior to the effective date of this Excess Plan no COVERED PARTY had a basis to believe that the act, error, or omission was a breach of professional duty or may result in a CLAIM; and

(b) There is no prior policy or policies or agreements to indemnify — which provide coverage for such liability or CLAIM, whether or not the available limits of liability of such prior policy or policies or agreements to indemnify are sufficient to pay any liability or CLAIM or whether or not the underlying limits and amount of such policy or policies or agreements to indemnify are different from this Excess Plan.

Subsection c(2)(a) of this Section will not apply as to any COVERED PARTY who, prior to the effective date of this Excess Plan, did not have a basis to believe that the act, error, or omission was a breach of professional duty or may result in a CLAIM, but only if THE FIRM circulated its Application for coverage among all FIRM ATTORNEYS listed in Section 10 of the Declarations and Current NON-OREGON ATTORNEYS listed in Section 14 of the Declarations before THE FIRM submitted it to the PLF.

d. This Excess Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe within the United States. This Excess Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe within the United States.

e. The amount the PLF will pay is limited as described in SECTION VI.

f. Coverage under this Excess Plan is conditioned upon full and timely payment of all assessments.

#### COMMENTS

**Claims Made Form.** *This is a claims made Excess Plan. It applies to CLAIMS first made during the COVERAGE PERIOD shown in the Declarations. CLAIMS first made either prior to or subsequent to the COVERAGE PERIOD are not covered by this Excess Plan.*

**When Claim First Made; Multiple Claims.** *Except as specifically provided, this Excess Plan does not cover CLAIMS made prior to the COVERAGE PERIOD. The Excess Plan is intended to follow the terms of the PLF CLAIMS MADE PLAN with respect to when a CLAIM is first made and with respect to the treatment of multiple CLAIMS. See Section I.8, IV.1(b)(2), and VI.2, and related Comments and Examples in the PLF PLAN. However, because of the exception in Subsection 1.b. in this Excess Plan, CLAIMS made during the COVERAGE PERIOD will not relate back to previously made CLAIMS that were made against other attorneys or firms, as long as THE FIRM did not reasonably know that a CLAIM would be made under this Excess Plan.*

Example: Firm G does not maintain excess coverage. Firm G and one of its members, Attorney A, are sued by Claimant in Year 1. The claim is covered under Attorney A's Year 1 primary PLF PLAN. Claimant amends the complaint in Year 2, and for the first time asserts the same claim also against Firm H and one of its members, Attorney B. Neither Firm H nor Attorney B had previously been aware of the potential claim, and no notice of a potential claim against Attorney B or Firm H had previously been given to the PLF or any other carrier. Firm H carried its Year 1 excess coverage with Carrier X and carries its Year 2 excess coverage with the PLF. Carrier X denies coverage for the claim because Firm H did not give notice of the claim to Carrier X in Year 1 and did not purchase tail coverage from Carrier X. Under the terms of Subsection b.1, in these limited circumstances, Firm H's Year 2 Excess Plan would become excess to the Year 1 PLF CLAIMS MADE PLAN issued by the PLF as primary coverage to Attorney B.

**Covered Activity During Coverage Period.** To the extent that any COVERED PARTY under this Excess Plan has knowledge prior to the COVERAGE PERIOD that particular acts, errors, or omissions have given rise or could give rise to a CLAIM, ~~it is reasonable that~~ that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered under this Excess Plan. Such CLAIMS should instead be covered under the policy or plan in force, if any, at the time the first such CLAIM was made or notice of a potential CLAIM could have been given under the terms of the prior policy or plan. Subsection (c) achieves these purposes by limiting the terms of the Coverage Grant with respect to acts, errors, or omissions which happen prior to the COVERAGE PERIOD so that no coverage is granted where there is prior knowledge, prior insurance or other coverage.

Example: Law firm maintains excess malpractice coverage with Carrier X in Year 1. The firm knows of a potential malpractice claim in September of that year, and could report it as a suspense matter or incident report to Carrier X at that time and obtain coverage under the firm's excess policy. The firm does not report the potential claim to Carrier X in Year 1. The firm obtains excess coverage from the PLF in Year 2, and the potential claim is actually asserted in April of Year 2. Whether or not the PLF has imposed a Retroactive Date for the firm's Year 2 coverage, there is no coverage for the claim under the firm's Year 2 Excess Plan with the PLF. This is true whether or not Carrier X provides coverage for the claim.

Example: Attorneys A, B, and C practice in a partnership. In Year 1, Attorney C knows of a potential claim arising from his activities, but does not tell the PLF or Attorneys A or B. Attorney A completes a Year 2 PLF excess program application on behalf of the firm, but does not reveal the potential claim because it is unknown to her. Attorney A does not circulate the application to attorneys B and C before submitting it to the PLF. The PLF issues an Excess Plan to the firm for Year 2, and the potential claim known to Attorney C in Year 1 is actually made against Attorneys A, B, and C and the firm in June of Year 2. Because the potential claim was known to a Covered Party (i.e., Attorney C) prior to the beginning of the Coverage Period, and because the firm did not circulate its application among the FIRM ATTORNEYS and Current NON-OREGON ATTORNEYS before submitting it to the PLF, the claim is not within the Coverage Grant. There is no coverage under the Year 2 Excess Plan for Attorneys A, B, or C or for the firm even though Attorneys A and B did not know of the potential claim in Year 1.

Example: Same facts as prior example, except that Attorney A did circulate the application to Attorneys B and C before submitting it to the PLF. Subsection c(2) will not be applied to deny coverage for the CLAIM as to Attorneys A and B and THE FIRM.

However, there will be no coverage for Attorney C because the CLAIM falls outside the coverage grant under the terms of Subsection c(2)(b) and because Attorney C made a material misrepresentation to the PLF in the application.

## 2. Defense

a. After all APPLICABLE UNDERLYING LIMITS have been exhausted and the applicable Deductible has been expended, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies until the Limits of Coverage extended by this Excess Plan are exhausted. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

b. With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all reasonable and necessary CLAIMS EXPENSES ~~incurred~~.~~the PLF may incur~~. All payments will reduce the Limits of Coverage.

c. If the Limits of Coverage stated in the Declarations are exhausted prior to the conclusion of any CLAIM, the PLF ~~may~~ withdraw from further defense of the CLAIM.

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## SECTION V – EXCLUSIONS FROM COVERAGE

### COMMENTS

*Although many of the Exclusions in this Excess Plan are similar to the Exclusions in the PLF CLAIMS MADE PLAN, the Exclusions have been modified to apply to the Excess Plan and should be read carefully. For example, because the Excess Plan is issued to law firms rather than to individual attorneys, the Exclusions were modified to make clear which ones apply to all firm members and which apply only to certain firm members. Exclusions 22 (office sharing), 23 (excluded attorney), and 24 (excluded firm) are not contained in the PLF CLAIMS MADE PLAN.*

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### ~~[WRONGFUL CONDUCT EXCLUSIONS]~~

1. **Fraudulent Claim Exclusion.** This Excess Plan does not apply to any COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.

2. **Wrongful Conduct Exclusion.** This Excess Plan does not apply to the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended:

(a) Any CLAIM against any COVERED PARTY arising out of or connected with any actual or alleged criminal act or conduct on the part of any COVERED PARTY;

(b) Any CLAIM against any COVERED PARTY based on any actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct on the part of any COVERED PARTY;

(c) Any CLAIM against any COVERED PARTY based on any COVERED PARTY'S intentional violation of the Oregon Rules of Professional Conduct (ORCP) or any other applicable code of professional conduct; or

(d) Any CLAIM based on or arising out of the non-payment of a valid and enforceable lien if actual notice of such lien was provided to any COVERED PARTY, or anyone employed by the FIRM, prior to the payment of funds to any person or entity other than the rightful lienholder.

Subsections (a), (b) and (c) of this exclusion do not apply to any COVERED PARTY who: (i) did not personally commit, direct or participate in any of the acts or conduct excluded by these provisions; and (ii) either had no knowledge of any such acts or conduct, or who after becoming aware of any such acts or conduct, did not acquiesce or remain passive regarding any such acts or conduct and, upon becoming aware of any such acts or conduct, immediately notified the PLF.

~~This Excess Plan does not apply to any COVERED PARTY for any CLAIM based upon or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by that COVERED PARTY or at the direction of that COVERED PARTY, or in which that COVERED PARTY acquiesces or remains passive after having personal knowledge thereof.~~

**3. Disciplinary Proceedings Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of a proceeding brought by the Oregon State Bar or any similar entity.

**4. Punitive Damages and Cost Award Exclusions.** This Excess Plan does not apply to:

**a.** The part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or

**b.** Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct, false or unwarranted certification in a pleading, and/or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### ~~[BUSINESS ACTIVITY EXCLUSIONS]~~

**5. Business Role Exclusion.** This Excess Plan does not apply to that part of any CLAIM based upon or arising out of any COVERED PARTY'S conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

**6. Business Ownership Interest Exclusion.** This Excess Plan does not apply to any CLAIM ~~by or on behalf~~based on or arising out of any business enterprise:

**a.** In which any COVERED PARTY has an ownership interest or had an ownership interest at the time of the alleged acts, errors, or omissions upon which the CLAIM is based;

**b.** In which any COVERED PARTY is a general partner, managing member, or employee, or was a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions upon which the CLAIM is based; or

**c.** That is controlled, operated, or managed by any COVERED PARTY, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed at the time of the alleged acts, errors, or omissions upon which the CLAIM is based.

Ownership interest, for purposes of this exclusion, will not include any ownership interest now or previously held solely as a passive investment as long as all COVERED PARTIES, those they control,

spouses, parents, step-parents, children, step-children, siblings, or any member of their households, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

7. **Partner and Employee Exclusion.** This Excess Plan does not apply to any CLAIM made by:

- a. THE FIRM'S present, former, or prospective partner, employer, or employee, or
- b. A present, former, or prospective officer, director, or employee of a professional corporation in which any COVERED PARTY is or was a shareholder,

unless such CLAIM arises out of conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

8. **ORPC 1.8 Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of any business transaction subject to ORPC 1.8(a) or its equivalent in which any COVERED PARTY participated with a client unless any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC 1, attached as Exhibit A to this Excess Plan, and has been properly executed by any COVERED PARTY and his or her client prior to the ~~occurrence-business transaction~~ giving rise to the CLAIM, ~~and either:~~

~~a. A copy of the executed disclosure form is forwarded to the PLF within ten (10) calendar days of execution, or~~

~~b. If delivery of a copy of the disclosure form to the PLF within ten (10) calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, the COVERED PARTY may instead send the PLF an alternative letter stating: (1) the name of the client with whom the COVERED PARTY is participating in a business transaction; (2) that the COVERED PARTY has provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a) or their equivalents; (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within ten (10) calendar days of execution of the disclosure letter.~~

9. **Investment Advice Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of any act, error, or omission in the course of providing INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all of the INVESTMENT ADVICE constitutes a COVERED ACTIVITY described in Section III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f, or g of the definition of INVESTMENT ADVICE in Section I.10 of the PLF CLAIMS MADE PLAN.

**[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]**

10. **Law Practice Business Activities or Benefits Exclusion.** This Excess Policy does not apply to any CLAIM:

a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, (or by any LAW ENTITY with which the COVERED PARTY, THE FIRM, or any other LAW ENTITY was associated at the time the fees, costs or expenses were paid, incurred or charged), including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.

b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements

owed or claimed to be owed to a COVERED PARTY, THE FIRM, or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or

- c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY or THE FIRM.
- d. In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by any COVERED PARTY regarding a client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

- ~~a. For the return of any fees, costs, or disbursements, including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;~~
- ~~b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements; or~~
- ~~c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.~~

- 11. Family Member and Ownership Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of an attorney COVERED PARTY'S legal services performed on behalf of the attorney COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of his or her household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest, based upon or arising out of the acts, errors, or omissions of that COVERED PARTY.

#### COMMENTS

*Work performed for family members is not covered under this Excess Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

- 12. Benefit Plan Fiduciary Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar plan.

- 13. Notary Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of THE FIRM'S employee and no COVERED PARTY has actual knowledge of such act.

~~[GOVERNMENT ACTIVITY EXCLUSION]~~



**14. Government Activity Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any conduct:

**a.** As a public official or an employee of a governmental body, subdivision, or agency; or

**b.** In any other capacity which comes within the defense and indemnity requirements of ORS 30.285 and 30.287 or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all rights against the public body.

~~[HOUSE COUNSEL EXCLUSION]~~

**15. House Counsel Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any conduct as an employee in an employer-employee relationship other than as an employee for a LAW ENTITY.

~~[GENERAL TORTIOUS CONDUCT EXCLUSIONS]~~

**16. General Tortious Conduct Exclusions.** This Excess Plan does not apply to any CLAIM against any COVERED PARTY for:

**a.** Bodily injury, sickness, disease, or death of any person;

**b.** Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or

**c.** Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise COVERED ACTIVITY.

**17. Unlawful Harassment and Discrimination Exclusion.** This Excess Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.

~~[PATENT EXCLUSION]~~

**18. Patent Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of professional services performed or any act, error, or omission committed in relation to the prosecution of a patent if the COVERED PARTY who performed the services was not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

**19.** Reserved.

~~[CONTRACTUAL OBLIGATION EXCLUSION]~~

**20. Contractual Obligation Exclusion.** This Plan does not apply to any CLAIM:

**a.** Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by ~~YOU a COVERED PARTY~~ or someone for whose conduct ~~any COVERED PARTY YOU are~~ is legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;

- b. Any costs connected to ORS 20.160 or similar statute or rule;
- c. For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or
- d. Claims in contract based upon an alleged promise to obtain a certain outcome or result.

~~[BANKRUPTCY TRUSTEE EXCLUSION]~~

**21. Bankruptcy Trustee Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any COVERED PARTY'S activity as a bankruptcy trustee.

~~[OFFICE SHARING EXCLUSION]~~

**22. Private Data Exclusion.** This Excess Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM. ~~This Excess Plan does not apply to any CLAIM alleging the vicarious liability of any COVERED PARTY under the doctrine of apparent partnership, partnership by estoppel, or any similar theory, for the acts, errors, or omissions of any attorney, professional corporation, or other entity not listed in the Declarations with whom THE FIRM or attorney COVERED PARTIES shared office space or office facilities at the time of any of the alleged acts, errors, or omissions.~~

COMMENTS

There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a COVERED PARTY; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a COVERED PARTY or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.

There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.

~~[EXCLUDED ATTORNEY EXCLUSION]~~

**23. Excluded Attorney Exclusion.** This Excess Plan does not apply to any CLAIM against any COVERED PARTY:

a. Arising from or relating to any act, error, or omission of any EXCLUDED ATTORNEY in any capacity or context, whether or not the COVERED PARTY personally participated in any such act, error, or omission or is vicariously liable, or

b. Alleging liability for the failure of a COVERED PARTY or any other person or entity to supervise, control, discover, prevent, or mitigate any activities of or harm caused by any EXCLUDED ATTORNEY.

~~[EXCLUDED FIRM EXCLUSION]~~

**24. Excluded Firm Exclusion.** This Excess Plan does not apply to any CLAIM made against a COVERED PARTY:

a. Which arises from or is related to any act, error, or omission of:

(1) An EXCLUDED FIRM, or

(2) A past or present partner, shareholder, associate, attorney, or employee (including any COVERED PARTY) of an EXCLUDED FIRM while employed by, a partner or shareholder of, or in any way associated with an EXCLUDED FIRM,

in any capacity or context, and whether or not the COVERED PARTY personally participated in any such act, error, or omission or is vicariously liable therefore, or

b. Alleging liability for the failure of a COVERED PARTY or any other person or entity to supervise, control, discover, prevent, or mitigate any activities of or harm caused by any EXCLUDED FIRM or any person described in Subsection a(2) above.

~~[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]~~

**25. Office Sharing Exclusion.** ~~This Excess Plan does not apply to any CLAIM alleging the vicarious liability of any COVERED PARTY under the doctrine of apparent partnership, partnership by estoppel, or any similar theory, for the acts, errors, or omissions of any attorney, professional corporation, or other entity not listed in the Declarations with whom THE FIRM or attorney COVERED PARTIES shared office space or office facilities at the time of any of the alleged acts, errors, or omissions. Confidential or This Excess Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.~~

~~COMMENTS~~

~~————— There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the~~

~~improper safeguarding or disposal of paper records would also fall within this exclusion.~~

~~————— There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.~~

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## SECTION VI – LIMITS OF COVERAGE AND DEDUCTIBLE

### 1. Limits of Coverage

**a.** Regardless of the number of COVERED PARTIES under this Excess Plan, the number of persons or organizations who sustain damage, or the number of CLAIMS made, the PLF's maximum liability for indemnity and CLAIMS EXPENSE under this Excess Plan will be limited to the amount shown as the Limits of Coverage in the Declarations, less the Deductible listed in the Declarations, if applicable. The making of CLAIMS against more than one COVERED PARTY does not increase the PLF's Limit of Coverage.

**b.** If the SAME OR RELATED CLAIMS are made in the PLAN YEAR of this Excess Plan and the PLAN YEARS of other Excess Plans issued to THE FIRM by the PLF, then only a single Limit of Coverage will apply to all such CLAIMS.

### 2. Deductible

**a.** The Deductible for COVERED PARTIES under this Excess Plan who are not also covered under the PLF CLAIMS MADE PLAN is either the maximum Limit of Liability for indemnity and Claims Expense under any insurance policy covering the CLAIM or, if there is no such policy or the insurer is either insolvent, bankrupt, or in liquidation, the amount listed in Section 5 of the Declarations.

**b.** THE FIRM is obligated to pay any Deductible not covered by insurance. The PLF's obligation to pay any indemnity or CLAIMS EXPENSE as a result of a CLAIM for which a Deductible applies is only in excess of the applicable amount of the Deductible. The Deductible applies separately to each CLAIM, except for SAME OR RELATED CLAIMS. The Deductible amount must be paid by THE FIRM as CLAIMS EXPENSES are incurred or a payment of indemnity is made. At the PLF's option, it may pay such CLAIMS EXPENSES or indemnity, and THE FIRM will be obligated to reimburse the PLF for the Deductible within ten (10) days after written demand from the PLF.

#### COMMENTS

*The making of the SAME OR RELATED CLAIMS against one or more lawyers in THE FIRM will not "stack" or create multiple Limits of Coverage. This is true even if the CLAIMS are made in different Plan Years. In that event, the applicable limit will be available limits from the Excess Plan in effect in the Plan Year in which the SAME OR RELATED CLAIMS are deemed first made. In no event will more than one Limit of Liability be available for all such CLAIMS.*

*Under the PLF CLAIMS MADE PLAN, the SAME OR RELATED CLAIMS will result in only one Limit of Coverage being available, even if CLAIMS are made against COVERED PARTIES in different LAW ENTITIES. The Excess Plan works differently.*

*The limits of Excess Plans issued to different firms may, where appropriate, “stack”; Excess Plans issued to any one firm do not. If SAME OR RELATED CLAIMS are made against COVERED PARTIES under Excess Plans issued by the PLF to two or more Law Firms, the available Limit of Coverage for THE FIRM under this Excess Plan will not be affected by the Limits of Coverage in other Excess Plans. THE FIRM, however, cannot “stack” limits of multiple Excess Plans issued to it for the SAME OR RELATED CLAIMS.*

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## SECTION VII – NOTICE OF CLAIMS

- 1.** THE FIRM must, as a condition precedent to the right of protection afforded any COVERED PARTY by this coverage, give the PLF, at the address shown in the Declarations, written notice of any CLAIM that is reasonably likely to involve any of the coverages of this Excess Plan. In the event a SUIT is brought against any COVERED PARTY, which is reasonably likely to involve any of the coverages of this Excess Plan, THE FIRM must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.
- 2.** If during the COVERAGE PERIOD, any COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Excess Plan, THE FIRM must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:
  - a.** The specific act, error, or omission;
  - b.** The injury or damage that has resulted or may result; and
  - c.** The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.
- 3.** If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under Subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

### COMMENTS

*This is a Claims Made Plan. Section IV.1.b determines when a CLAIM is first made for the purpose of triggering coverage under this Plan. Section VII states the COVERED PARTY'S obligation to provide the PLF with prompt notice of CLAIMS, SUITS, and potential CLAIMS.*

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## SECTION VIII – COVERAGE DETERMINATIONS

- 1.** This Excess Plan is governed by the laws of the State of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Excess Plan. Any dispute as to the applicability, interpretation, or enforceability of this Excess Plan, or any other issue pertaining to the provision of benefits under this Excess Plan, between any COVERED PARTY (or anyone

claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the State of Oregon, which will have exclusive jurisdiction and venue of such disputes at the trial level.

**2.** The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.

**3.** In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that this Excess Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

**4.** The bankruptcy or insolvency of a COVERED PARTY will not relieve the PLF of its obligations under this Excess Plan.

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## SECTION IX – ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

As a condition of coverage under this Excess Plan, every COVERED PARTY must satisfy all conditions of the PLF CLAIMS MADE PLAN.

### COMMENTS

*Among the conditions of coverage referred to in this section are the conditions of coverage stated at Section IX of the PLF PLAN.*

*The obligations of the COVERED PARTIES under this section as well as the other sections of the Excess Plan are to be performed without charge to the PLF.*

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## SECTION X – ACTIONS BETWEEN THE PLF AND COVERED PARTIES

**1.** No legal action in connection with this Excess Plan may be brought against the PLF unless all COVERED PARTIES have fully complied with all terms of this Excess Plan.

**2.** The PLF may bring an ACTION against a COVERED PARTY if:

**a.** The PLF pays a CLAIM under this Excess Plan or any other Excess Plan issued by the PLF;

**b.** The COVERED PARTY under this Excess Plan is alleged to be liable for all or part of the damages paid by the PLF;

- c. As between the COVERED PARTY and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY for contribution, indemnity, or otherwise, for all or part of the damages paid; and
- d. Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Excess Plan.

3. In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate up to the full amount the PLF has paid. However, this section shall not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery which would entitle the COVERED PARTY to indemnity under this Excess Plan if the PLF's action were successful.

#### COMMENTS

*Under certain circumstances, a claim against a COVERED PARTY may not be covered because of an exclusion or other applicable provision of the Excess Plan issued to a firm. However, in some cases the PLF may be required to pay the claim nonetheless because of its obligation to another COVERED PARTY under the terms of the firm's Excess Plan or under another Excess Plan issued by the PLF. This might occur, for example, when the attorney responsible for a claim has no coverage due to his or her intentional wrongful conduct, but his or her partner did not engage in or know of the wrongful conduct but is nevertheless allegedly liable. In these circumstances, if the PLF pays some or all of the claim arising from the responsible attorney's conduct, it ~~is only fair that~~ the PLF ~~have the right to may~~ seek recovery back from that attorney; otherwise, the PLF would effectively be covering the attorney's non-covered claims under this Excess Plan simply because other COVERED PARTIES were also liable.*

Example: Attorney A misappropriates trust account funds belonging to Client X.

*Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the claim under his applicable PLF PLAN or the firm's Excess Plan, but Attorney B has coverage for her liability under an Excess Plan issued by the PLF. The PLF pays the claim. Section X.2 makes clear the PLF has the right to sue Attorney A for the damages the PLF paid.*

Example: Same facts as prior example, except that the PLF loans funds to the person or entity liable under terms which obligate the borrower to repay the loan to the extent the borrower recovers damages from Attorney A in an action for indemnity. Section X.2 makes clear the PLF has the right pursuant to such arrangement to participate in the borrower's indemnity action against Attorney A.

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## SECTION XI – SUPPLEMENTAL ASSESSMENTS

This Excess Plan is assessable. Each PLAN YEAR is accounted for and assessable using reasonable accounting standards and methods of assessment. If the PLF determines in its discretion that a supplemental assessment is necessary to pay for CLAIMS, CLAIMS EXPENSE, or other expenses arising from or incurred during either this PLAN YEAR or a previous PLAN YEAR, THE FIRM agrees to pay its supplemental assessment to the PLF within thirty (30) days of request. THE FIRM further agrees that

liability for such supplemental assessments shall be joint and several among THE FIRM and the partners, shareholders, and professional corporations listed as FIRM ATTORNEYS in the Declarations.

The PLF is authorized to make additional assessments for this PLAN YEAR until all its liability for this PLAN YEAR is terminated, whether or not any COVERED PARTY maintains coverage under an Excess Plan issued by the PLF at the time assessments are imposed.

#### COMMENTS

*This section is limited to a statement of the COVERED PARTIES' contractual obligation to pay supplemental assessments should the assessments originally levied be inadequate to pay all claims, claims expense, and other expenses arising from this PLAN YEAR. It is not intended to cover other assessments levied by the PLF, such as the assessment initially paid to purchase coverage under this Excess Plan or any regular or special underwriting assessment paid by any member of THE FIRM in connection with the primary PLF PLAN.*

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## SECTION XII – RELATION OF THE PLF'S COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE

If any COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify, including but not limited to self-insured retentions, deductibles, or self insurance, which also applies to any loss or CLAIM covered by this Excess Plan, the PLF will not be liable under this Excess Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the Limits of Coverage of this Excess Plan.

#### COMMENTS

*This Excess Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Excess Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under Lamb-Weston v. Oregon Automobile Ins. Co., 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## SECTION XIII – WAIVER AND ESTOPPEL

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Excess Plan, nor shall the terms of this Excess Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## SECTION XIV – EXTENDED REPORTING COVERAGE

THE FIRM becomes eligible to purchase extended reporting coverage after 24 months of continuous excess coverage with the PLF. Upon termination or cancellation of this Excess Plan by either THE FIRM



or the PLF, THE FIRM, ~~may be eligible if qualified, has the right~~ to purchase extended reporting coverage for one of the following periods for an additional assessment equal to the percent shown below of the assessment levied against THE FIRM for this Excess Plan (as calculated on an annual basis). Eligibility for any extended reporting coverage is determined by the PLF's underwriting department based on the FIRM's claims experience and other underwriting factors.

| <b>Extended Reporting Coverage Period</b> | <b>Additional Assessment</b> |
|---|------------------------------|
| 12 Months                                 | 100 percent                  |
| 24 Months                                 | 160 percent                  |
| 36 Months                                 | 200 percent                  |
| 60 Months                                 | 250 percent                  |

THE FIRM must exercise this right and pay the assessment within 30 days after the termination or cancellation. Failure to exercise THE FIRM'S right and make payment within this 30-day period will result in forfeiture of all THE FIRM'S rights under this Section.

If THE FIRM qualifies for extended reporting coverage under this Section and timely exercises its rights and pays the required assessment, it will be issued an endorsement extending the period within which a CLAIM can be first made for the additional reporting period after the date of termination or cancellation which THE FIRM has selected. This endorsement will not otherwise change the terms of this Excess Plan. The right to extended reporting coverage under this Section will not be available if cancellation is by the PLF because of:

- a. The failure to pay when due any assessment or other amounts to the PLF; or
- b. The failure to comply with any other term or condition of this Excess Plan.

#### COMMENTS

*This section sets forth THE FIRM'S right to extended reporting coverage. Exercise of the rights hereunder does not establish new or increased limits of coverage and does not extend the period during which the COVERED ACTIVITY must occur to be covered by this Excess Plan.*

*Example: A firm obtains excess coverage from the PLF in Year 1, but discontinues coverage in Year 2. The firm exercises its rights under Section XIV of the Year 1 Excess Plan and purchases an extended reporting coverage period of 36 months during the first 30 days of Year 2. A CLAIM is made against THE FIRM in March of Year 3 based upon a COVERED ACTIVITY of a firm member occurring in October of Year 1. Because the claim was made during the 36-month extended reporting coverage period and arose from a COVERED ACTIVITY occurring during the COVERAGE PERIOD, it is covered under the terms and within the remaining Limits of Coverage of THE FIRM'S Year 1 Excess Plan.*

*Example: Same facts as prior example, except the claim which is made against THE FIRM in March of Year 3 is based upon an alleged error of a firm member occurring in January of Year 2. Because the alleged error occurred after the end of the COVERAGE PERIOD for the Year 1 Excess Plan, the claim does not fall within the terms of the*

*extended reporting coverage and so there is no coverage for the claim under THE FIRM'S Year 1 Excess Plan.*

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## SECTION XV – ASSIGNMENT

THE FIRM'S interest hereunder and the interest of any COVERED PARTY is not assignable.

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## SECTION XVI – OTHER CONDITIONS

### 1. Application

A copy of the Application which THE FIRM submitted to the PLF in seeking coverage under this Excess Plan is attached to and shall be deemed a part of this Excess Plan. All statements and descriptions in the Application are deemed to be representations to the PLF upon which it has relied in agreeing to provide THE FIRM with coverage under this Excess Plan. Any misrepresentations, omissions, concealments of fact, or incorrect statements will negate coverage and prevent recovery under this Excess Plan if the misrepresentations, omissions, concealments of fact, or incorrect statements:

- a. Are contained in the Application;
- b. Are material and have been relied upon by the PLF; and
- c. Are either:
  - (1) Fraudulent; or
  - (2) Material either to the acceptance of the risk or to the hazard assumed by the PLF.

### 2. Cancellation

a. This Excess Plan may be canceled by THE FIRM by surrender of the Excess Plan to the PLF or by mailing or delivering written notice to the PLF stating when thereafter such cancellation will be effective. If canceled by THE FIRM, the PLF will retain the assessment on a pro rata basis.

b. This Excess Plan may be canceled by the PLF for any of the following reasons:

(1) IF THE FIRM has failed to pay an assessment when due, the PLF may cancel the Excess Plan by mailing to THE FIRM written notice stating when, not less than ten (10) days thereafter, such cancellation shall be effective.

(2) Other than for nonpayment of assessments as provided for in Subsection b(1) above, coverage under this Excess Plan may be canceled by the PLF prior to the expiration of the COVERAGE PERIOD only for one of the following specific reasons:

- a. Material misrepresentation by any COVERED PARTY;
- b. Substantial breaches of contractual duties, conditions, or warranties by any COVERED PARTY; or

c. Revocation, suspension, or surrender of any COVERED PARTY'S license or right to practice law.

Such cancellation may be made by mailing or delivering of written notice to THE FIRM stating when, not less than ten (10) days thereafter, such cancellation shall be effective.

The time of surrender of this Excess Plan or the effective date and hour of cancellation stated in the notice shall become the end of the COVERAGE PERIOD. Delivery of a written notice either by THE FIRM or by the PLF will be equivalent to mailing. If the PLF cancels, assessments shall be computed and refunded to THE FIRM pro rata. Assessment adjustment may be made either at the time cancellation is effected or as soon as practicable thereafter.

### **3. Termination**

This Excess Plan is non-renewable. This Excess Plan will automatically terminate on the date and time shown as the end of the COVERAGE PERIOD in the Declarations unless canceled by the PLF or by THE FIRM in accordance with the provisions of this Excess Plan prior to such date and time.

|

**~~EXHIBIT A -- FORM ORPC-1~~**

~~Dear [Client]:~~

~~This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.~~

~~The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:\_\_\_\_\_~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].~~

~~Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.~~

~~I enclose an article "Business Deals Can Cause Problems," which contains additional information.~~

~~If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.~~

~~Very truly yours,~~

~~[Attorney Name and Signature]~~

~~I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:~~

\_\_\_\_\_  
\_\_\_\_\_  
~~[Client's Signature] [Date]~~

~~Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.~~

~~**BUSINESS DEALS CAN CAUSE PROBLEMS** (Complying With ORPC 1.8(a))~~

~~By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar~~

~~Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.~~

~~ORPC 1.8(a) and 1.0(g) read as follows:—~~

~~**Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**~~

~~(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:~~

~~(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

~~**ORPC 1.0 Terminology—**~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(e) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.~~

~~A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a);~~

~~DR 5-104(A), because the friend was never advised to seek independent legal advice.~~

~~Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.~~

~~Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.~~

~~In order to avoid the ethical problems addressed by the conflict-of-interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.~~

~~201~~ OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND

~~2016~~5 PRO BONO PROGRAM  
CLAIMS MADE MASTER PLAN

NOTICE

This Pro Bono Program Claims Made Master Plan ("Master Plan") contains provisions that reduce the Limits of Coverage by the costs of legal de-fense. See SECTIONS IV and VI.

Various provisions in this Master Plan restrict coverage. Read the entire Master Plan to determine rights, duties, and what is and is not covered.

INTERPRETATION OF THIS MASTER PLAN

~~**Bracketed Titles.** The bracketed titles appearing throughout this Master Plan are not part of the Master Plan and should not be used as an aid in interpreting the Master Plan. The bracketed titles are intended simply as a guide to locating pertinent provisions.~~

~~**Use of Capitals.** Capitalized terms are defined in SECTION I. The definition of COVERED PARTY appearing in SECTION II and the definition of COVERED ACTIVITY appearing in SECTION III are particularly crucial to the understanding of the Master Plan.~~

**Master Plan Comments.** The discussions labeled "*COMMENTS*" following various provisions of the Master Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Master Plan.

~~The Comments are similar in form to those in the Uniform Commercial Code and Restatements. They are intended to aid in the construction of the Master Plan language. The Comments are to assist attorneys in interpreting the coverage available to them and to provide a specific basis for interpretation by courts and arbitrators.~~

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SECTION I — DEFINITIONS

Throughout this Master Plan, when appearing in capital letters:

1. "BUSINESS TRUSTEE" means one who acts in the capacity of or with the title "trustee" and whose activities include the operation, management, or control of any business property, business, or institution in a manner similar to an owner, officer, director, partner, or shareholder.

*COMMENTS*

~~The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This Master Plan is intended to cover the ordinary range of activities in which attorneys typically engage while providing services through a PRO BONO PROGRAM. The Master Plan is not intended to cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Master Plan include, among other things:~~

~~—serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.~~

2. “CLAIM” means a demand for DAMAGES or written notice to a COVERED PARTY of an intent to hold a COVERED PARTY liable as a result of a COVERED ACTIVITY, if such notice might reasonably be expected to result in an assertion of a right to DAMAGES and not otherwise covered under a PLF Claims Made Plan.

3. "CLAIMS EXPENSE" means:

a. Fees and expenses charged by any attorney designated by the PLF;

b. All other fees, costs, and expenses resulting from the investigation, adjustment, defense, repair, and appeal of a CLAIM, if incurred by the PLF; or

c. Fees charged by any attorney designated by the COVERED PARTY with the PLF’s written consent.

However, CLAIMS EXPENSE does not include the PLF’s costs for compensation of its regular employees ~~and officials~~ or the PLF’s other routine administrative costs.

4. "CLAIMS EXPENSE ALLOWANCE" means the separate allowance for aggregate CLAIMS EXPENSE for all CLAIMS as provided for in SECTION VI.1.b. of this Master Plan.

5. "COVERAGE PERIOD" means the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."

6. "COVERED ACTIVITY" means conduct qualifying as such under SECTION III — WHAT IS A COVERED ACTIVITY.

7. "COVERED PARTY" means any person or organization qualifying as such under SECTION II — WHO IS A COVERED PARTY.

8. “DAMAGES” means money to be paid as compensation for harm or loss. It does not refer to fines, penalties, punitive or exemplary damages, or equitable relief such as restitution, disgorgement, rescission, injunctions, accountings or damages and relief otherwise excluded by this Plan.

9. "EXCESS CLAIMS EXPENSE" means any CLAIMS EXPENSE in excess of the CLAIMS EXPENSE ALLOWANCE. EXCESS CLAIMS EXPENSE is included in the Limits of Coverage at SECTION VI.1.a and reduces amounts available to pay DAMAGES under this Master Plan.

10. "INVESTMENT ADVICE" refers to any of the following activities:

a. Advising any person, firm, corporation, or other entity respecting the value of a particular investment, or recommending investing in, purchasing, or selling a particular investment;

b. Managing any investment;



- c. Buying or selling any investment for another;
- d. (1) Acting as a broker for a borrower or lender, or  
 (2) Advising or failing to advise any person in connection with the borrowing of any funds or property by any COVERED PARTY for the COVERED PARTY or for another;
- e. Issuing or promulgating any economic analysis of any investment, or warranting or guaranteeing the value, nature, collectability, or characteristics of any investment;
- f. Giving advice of any nature when the compensation for such advice is in whole or in part contingent or dependent on the success or failure of a particular investment; or
- g. Inducing someone to make a particular investment.

11. "LAW ENTITY" refers to a professional corporation, partnership, limited liability partnership, limited liability company, or sole proprietorship engaged in the private practice of law in Oregon.

12. "MASTER PLAN YEAR" means the period January 1 through December 31 of the calendar year for which this Master Plan was issued.

13. "PLF" means the Professional Liability Fund of the Oregon State Bar.

14. "SAME OR RELATED CLAIMS" means two or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, ~~liability~~liabilities, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus. ~~CLAIMS are related in the following situations~~Examples include, but are not limited to, the following:

- a. *Secondary or dependent liability.* CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are related to the CLAIMS on which they are based.
- b. *Same transactions or occurrences.* Multiple CLAIMS arising out of the same transaction or occurrence or series of transactions or occurrences are related. However, with regard to this Subsection b only, the PLF will not treat the CLAIMS as related if:
  - (1) the participating COVERED PARTIES acted independently of one another;
  - (2) they represented different clients or groups of clients whose interests were adverse; and
  - (3) the claimants do not rely on any common theory of liability or damage.
- c. *Alleged scheme or plan.* If claimants ~~attempt to~~ tie together different acts as part of an alleged overall scheme or operation, then the CLAIMS are related.
- d. *Actual pattern or practice.* Even if a scheme or practice is not alleged, CLAIMS that

arise from a method, pattern, or practice in fact used or adopted by one or more COVERED PARTIES or LAW ENTITIES in representing multiple clients in similar matters are related.

e. *One loss.* When successive or collective errors each cause or contribute to single or multiple clients' and/or claimants' harm or cumulatively enhance their damages or losses, then the CLAIMS are related.

f. *Class actions.* All CLAIMS alleged as part of a class action or purported class action are related.

#### COMMENTS

***SAME OR RELATED CLAIMS.*** Each PLF Master Plan and PLF Claims Made Plan sets a maximum limit of coverage per year. This limit defines the PLF's total maximum obligation under the terms of each Plan issued by the PLF. However, absent additional Plan provisions, numerous circumstances could arise in which the PLF, as issuer of other PLF Master Plans and PLF Claims Made Plans, would be liable beyond the limits specified in one individual Plan. For example, Plans issued to the same attorney in different years might apply. Or, Plans issued to different attorneys might all apply. In some circumstances, the PLF ~~intends to may~~ extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF ~~does not so intend~~ will not extend separate limits under each Plan. Because the concept of "relatedness" is broad and factually based, there is no one definition or rule that will apply to every situation. The PLF has therefore elected to explain its intent by listing certain circumstances in which only one limit is available regardless of the number of Plans that may apply. See Subsections 14.a to 14.f above. To aid in interpretation, the following are examples of SAME OR RELATED CLAIMS:

*Example No. 1: Attorney A is an associate in a firm and commits malpractice. CLAIMS are made against Attorney A and various partners in the firm. All attorneys share one limit. CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are always related to the CLAIMS on which they are based. See Subsection 14.a above. Even if Attorney A and some of the other lawyers are at different firms at the time of the CLAIM, all attorneys and the firm share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE.*

*Example No. 2: Attorney A writes a tax opinion for an investment offering, and Attorneys B and C with a different law firm assemble the offering circular. Investors 1 and 2 bring CLAIMS in 2010 and Investor 3 brings a CLAIM in 2011 relating to the offering. No CLAIM is asserted prior to 2010. Only one Limit of Coverage applies to all CLAIMS. This is because the CLAIMS arise out of the same transaction or occurrence, or series of transactions or occurrences. See Subsection 14.b above. CLAIMS by investors in the same or similar investments will almost always be related. However, because the CLAIMS in this example are made against COVERED PARTIES in two different firms, up to two CLAIMS EXPENSE ALLOWANCES may potentially apply. See Section VI.2. Note also that, under these facts, all CLAIMS against Attorneys A, B, and C are treated as having been first made in 2010, pursuant to Section IV.1.b.(2). This could result in available limits having been exhausted before a CLAIM is eventually made against a particular COVERED PARTY. The timing of making CLAIMS does not increase the available limits.*

*Example No. 3: Attorneys A and B represent husband and wife, respectively, in a divorce. Husband sues A for malpractice in litigating his prenuptial agreement. Wife sues B for not getting*

her proper custody rights over the children. A's and B's CLAIMS are not related. A's and B's CLAIMS would be related, but for the exception in the second sentence of Subsection 14.b above.

Example No. 4: An owner sells his company to its employees by selling shares to two employee benefit plans set up for that purpose. The plans and/or their members sue the company, its outside corporate counsel A, its ERISA lawyer B, the owner, his attorney C, and the plans' former attorney D, contending there were improprieties in the due diligence, the form of the agreements, and the amount and value of shares issued. The defendants file cross-claims. All CLAIMS are related.—~~F: they arise out of the same transactions or occurrences and therefore are related under Subsection 14.b. For the exception in Subsection 14.b to apply, all three elements must be satisfied. The exception does not apply because the claimants rely on common theories of liability. In addition, the exception may not apply because not all interests were adverse, theories of damages are common, or the attorneys did not act independently of one another. Finally, even if the exception in Subsection 14.b did apply, the CLAIMS would still be related under Subsection 14.d because they involve one loss. Although the CLAIMS are related, if all four attorneys' firms are sued, depending on the circumstances, up to four total CLAIMS EXPENSE ALLOWANCES might be available under Section VI.2.~~

Example No. 5: Attorney F represents an investment manager for multiple transactions over multiple years in which the manager purchased stocks in Company A on behalf of various groups of investors. Attorneys G and H represent different groups of investors. Attorney J represents Company A. Attorneys F, G, H, and J are all in different firms. They are all sued by the investors for securities violations arising out of this group of transactions. ~~Although the different acts by different lawyers at different times could legitimately be viewed as separate and unconnected, the claimant in this example attempts to tie them together as part of an alleged overall scheme or operation.—~~The CLAIMS are related because the claimants have made them so. See Subsection 14.c above. This will often be the case in securities CLAIMS. As long as such allegations remain in the case, only one limit will be available, even if alternative CLAIMS are also alleged. In this example, although there is only one Limit of Coverage available for all CLAIMS, depending on the circumstances, multiple CLAIMS EXPENSE ALLOWANCES might be available. See Section VI.2.

Example No. 6: Attorneys A, B, and C in the same firm represent a large number of asbestos clients over ten years' time, using a firm-wide formula for evaluating large numbers of cases with minimum effort. They are sued by certain clients for improper evaluation of their cases' values, although the plaintiffs do not allege a common scheme or plan. Because the firm in fact operated a firm-wide formula for handling the cases, the CLAIMS are related based on the COVERED PARTIES' own pattern or practice. The CLAIMS are related because the COVERED PARTIES' own conduct has made them so. See Subsection 14.d above. Attorneys A, B, and C will share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE. LAW ENTITIES should protect themselves from such CLAIMS brought by multiple clients by purchasing adequate excess insurance.

Example No. 7: Attorney C represents a group of clients at trial and commits certain errors. Attorney D of the same firm undertakes the appeal, but fails to file the notice of appeal on time. Attorney E is hired by clients to sue Attorneys C and D for malpractice, but misses the statute of limitations. Clients sue all three attorneys. The CLAIMS are related and only a single Limit of Coverage applies to all CLAIMS. See Subsection 14.e above. When, as in this example, successive or collective errors each cause single or multiple clients and/or claimants harm or cumulatively enhance their damages or losses, then the CLAIMS are related. In such a situation, a claimant or group of claimants cannot increase the limits potentially available by alleging separate errors by

separate attorneys. Attorney E, however, may be entitled to a CLAIMS EXPENSE ALLOWANCE separate from the one shared by C and D.

*Example No. 8: Attorneys A, B, and C in the same firm represent a large banking institution. They are sued by the bank's customers in a class action lawsuit for their part in advising the bank on allegedly improper banking practices. All CLAIMS are related. No class action or purported class action can ever trigger more than one Limit of Coverage. See Subsection 14.f above.*

**15.** "SUIT" means a civil proceeding in which DAMAGES are alleged. "SUIT" includes an arbitration or alternative dispute resolution proceeding to which the COVERED PARTY submits with the consent of the PLF.

~~**16.** "YOU" and "YOUR" mean the PRO BONO PROGRAM shown in the Declarations.~~

**1716.** "PRO BONO PROGRAM" means the Pro Bono Program shown in the Declarations under the heading "PRO BONO PROGRAM."

**1817.** "VOLUNTEER ATTORNEY" means an attorney who meets all of the following conditions:

**a.** The attorney has provided volunteer pro bono legal services to clients without compensation through the PRO BONO PROGRAM;

**b.** At the time of providing the legal services referred to in Subsection a above, the attorney was not employed by the PRO BONO PROGRAM or compensated in any way by the PRO BONO PROGRAM;

~~**c. e.** At the time of providing the legal services referred to in Subsection a above, the attorney was eligible under Oregon State Bar Rules to volunteer for the certified PRO BONO PROGRAM; and~~

~~**d.** Not otherwise covered by a PLF Claims Made Plan.-~~

## SECTION II — WHO IS A COVERED PARTY

**1.** The following are COVERED PARTIES:

~~**a.** YOU~~ The PRO BONO PROGRAM.

**b.** Any current or former VOLUNTEER ATTORNEY, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY.

**c.** In the event of death, adjudicated incapacity, or bankruptcy, the conservator, guardian, trustee in bankruptcy, or legal or personal representative of any COVERED PARTY listed in Subsection b, but only to the extent that such COVERED PARTY would otherwise be provided coverage under this Master Plan.

~~**d.** Any attorney or LAW ENTITY legally liable for YOUR COVERED ACTIVITIES, but only to the extent such legal liability arises from YOUR COVERED ACTIVITIES.~~

## COMMENTS

Please note that VOLUNTEER ATTORNEYS have coverage under this Master Plan only for CLAIMS which arise out of work performed for ~~YOU~~ the PRO BONO PROGRAM. For example, there is no coverage for CLAIMS which arise out of work performed for another organization or program, for a client outside of ~~YOUR program~~ the PRO BONO PROGRAM, or for a COVERED PARTY'S private practice, employment, or outside activities.

### SECTION III — WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES, if the acts, errors, or omissions occur during the COVERAGE PERIOD; or prior to the COVERAGE PERIOD, if on the effective date of this Master Plan ~~YOU have~~ the PRO BONO PROGRAM has no knowledge that any CLAIM has been asserted arising out of such prior act, error, or omission, and there is no prior policy, PLF Claims Made Plan or Master Plan that provides coverage for such liability or CLAIM resulting from the act, error, or omission, whether or not the available limits of liability of such prior policy or Master Plan are sufficient to pay any liability or CLAIM:

#### ~~[VOLUNTEER ATTORNEY'S CONDUCT]~~

**1. Volunteer Attorney's Conduct.** Any act, error, or omission committed by a VOLUNTEER ATTORNEY which satisfies all of the following criteria:

**a.** The VOLUNTEER ATTORNEY committed the act, error, or omission in rendering professional services in the VOLUNTEER ATTORNEY'S capacity as an attorney, or in failing to render professional services that should have been rendered in the VOLUNTEER ATTORNEY'S capacity as an attorney.

**b.** At the time the VOLUNTEER ATTORNEY rendered or failed to render these professional services:

**(1)** The VOLUNTEER ATTORNEY was providing services to a client served by ~~YOUR program~~ the PRO BONO PROGRAM and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM, and

**(2)** Such activity occurred after any Retroactive Date shown in the Declarations to this Master Plan.

#### ~~[CONDUCT OF OTHERS]~~

**2. Conduct of Others.** Any act, error or omission committed by a person for whom a VOLUNTEER ATTORNEY is legally liable in the VOLUNTEER ATTORNEY'S capacity as an attorney while providing legal services to clients through ~~YOU~~ the PRO BONO PROGRAM; provided each of the following criteria is satisfied:

- a. The act, error, or omission causing the VOLUNTEER ATTORNEY'S liability:
  - (1) Occurred while the VOLUNTEER ATTORNEY was providing services to a client served by YOU and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM, and
  - (2) Occurred after any Retroactive Date shown in the Declarations to this Master Plan.
- b. The act, error, or omission, if committed by the VOLUNTEER ATTORNEY, would constitute a COVERED ACTIVITY under this Master Plan.

~~VOLUNTEER ATTORNEY'S CONDUCT IN A SPECIAL CAPACITY~~

3. **Volunteer Attorney's Conduct in a Special Capacity.** Any act, error, or omission committed by the VOLUNTEER ATTORNEY in the capacity of personal representative, administrator, conservator, executor, guardian, special representative pursuant to ORS 128.179, or trustee (except BUSINESS TRUSTEE); provided, at the time of the act, error, or omission, each of the following criteria was satisfied:

- a. The VOLUNTEER ATTORNEY was providing services to a client served by ~~YOU~~ the PRO BONO PROGRAM and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM.
- b. Such activity occurred after any Retroactive Date shown in the Declarations to this Master Plan.

COMMENTS

*To qualify for coverage, a CLAIM must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage including the following:*

***Prior CLAIMS.*** Section III limits the definition of COVERED ACTIVITY with respect to acts, errors, or omissions that happen prior to the COVERAGE PERIOD, so that no coverage is granted when there is prior knowledge or prior insurance. For illustration of the application of this language, see *Chamberlin v. Smith*, 140 Cal Rptr 493 (1977).

~~*To the extent there is prior insurance or other coverage applicable to the CLAIM, it is reasonable to omit the extension of further coverage. Likewise, to the extent YOU or the VOLUNTEER ATTORNEY have knowledge that particular acts, errors, or omissions have given rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered. Such CLAIMS should instead be covered under the policy or Master Plan in force, if any, at the time the first such CLAIM was made.*~~

***VOLUNTEER ATTORNEY.*** For a VOLUNTEER ATTORNEY'S actions to constitute a COVERED ACTIVITY, the VOLUNTEER ATTORNEY must have been performing work or providing services with the scope of activities assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM.

**Types of Activity.** COVERED ACTIVITIES have been divided into three categories. Subsection 1 deals with coverage for a VOLUNTEER ATTORNEY'S own conduct as an attorney. Subsection 2 deals with coverage for a VOLUNTEER ATTORNEY'S liability for the conduct of others. Subsection 3 deals with coverage for a VOLUNTEER ATTORNEY'S conduct in a special capacity (e.g. as a personal representative of an estate). The terms "BUSINESS TRUSTEE" and "VOLUNTEER ATTORNEY" as used in this section are defined at SECTION I – DEFINITIONS.

**Special Capacity.** Subsection 3 provides limited coverage for VOLUNTEER ATTORNEY acts as a personal representative, administrator, conservator, executor, guardian, or trustee. However, not all acts in a special capacity are covered under this Master Plan. Attorneys acting in a special capacity described in Subsection 3 of Section III may subject themselves to claims from third parties that are beyond the coverage provided by this Master Plan. For example, in acting as a conservator or personal representative, an attorney may engage in certain business activities, such as terminating an employee or signing a contract. If such actions result in a claim by the terminated employee or the other party to the contract, the estate or corpus should respond to such claims in the first instance, and should protect the attorney in the process. Attorneys engaged in these activities should obtain appropriate commercial general liability, errors and omissions, or other commercial coverage. The claim will not be covered under Subsection 3 of Section III.

The Master Plan ~~purposefully~~ uses the term "special capacity" rather than "fiduciary" in Subsection 3 to avoid any implication that this coverage includes fiduciary obligations other than those specifically identified. There is no coverage for VOLUNTEER ATTORNEY'S conduct under Subsection 3 unless VOLUNTEER ATTORNEY was formally named or designated as a personal representative, administrator, conservator, executor, guardian, or trustee (except BUSINESS TRUSTEE) and served in such capacity.

The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This covers the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan does not cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.

**Retroactive Date.** This section introduces the concept of a Retroactive Date. A PRO BONO PROGRAM may have a Retroactive Date in its Master Plan which may place an act, error, or omission outside the definition of a COVERED ACTIVITY, thereby eliminating coverage for any resulting CLAIM under the Master Plan for the PRO BONO PROGRAM and its VOLUNTEER ATTORNEYS. If a Retroactive Date applies to a CLAIM to place it outside the definition of a COVERED ACTIVITY herein, there will be no coverage for the CLAIM under this Master Plan as to any COVERED PARTY, even for vicarious liability.

## SECTION IV – GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Master Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 - Defense.

**b.** This Master Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

**(1)** The applicable COVERAGE PERIOD for a CLAIM will be the earliest of:

**(a)** When a lawsuit is filed or an arbitration or ADR proceeding is formally initiated, or

**(b)** When notice of a CLAIM is received by any COVERED PARTY or by the PLF; or

**(c)** When the PLF first becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM; or

**(d)** When a claimant intends to make a CLAIM but defers assertion of the CLAIM for the purpose of obtaining coverage under a later COVERAGE PERIOD and the COVERED PARTY knows or should know that the COVERED ACTIVITY that is the basis of the CLAIM could result in a CLAIM.

**(2)** Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. This provision will apply to ~~YOU~~ the PRO BONO PROGRAM only if ~~YOU have the PRO BONO PROGRAM has~~ coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or claim.

**c.** This Master Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Master Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

**d.** The amount the PLF will pay for damages is limited as described in SECTION VI.

**e.** Coverage under this Master Plan is conditioned upon compliance with all requirements for Pro Bono Programs under PLF Policy 3.800 and all terms and conditions of this Master Plan.

## **2. Defense.**

**a.** Until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage extended by this Master Plan are exhausted, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of



any CLAIM or potential CLAIM.

b. With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all reasonable and necessary CLAIMS EXPENSE ~~incurred~~~~the PLF may incur~~. All payments for EXCESS CLAIMS EXPENSE will reduce the Limits of Coverage.

c. If the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage extended by this Master Plan are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

#### COMMENTS

**Claims Made Coverage.** *As claims made coverage, this Master Plan applies to CLAIMS first made during the time period shown in the Declarations. CLAIMS first made either prior to or subsequent to that time period are not covered by this Master Plan, although they may be covered by a prior or subsequent Master Plan.*

**Damages.** *This Master Plan grants coverage only for CLAIMS seeking DAMAGES. There is no coverage granted for other claims, actions, suits, or proceedings seeking equitable remedies such as restitution of funds or property, disgorgement, accountings or injunctions.*

**When Claim First Made to PLF.** ~~Subsection 1.b(1) of this section is intended to make clear that the earliest of the several events listed determines when the CLAIM is first made.~~ Subsection 1.b(1)(c) adopts an objective, reasonable person standard to determine when the PLF's knowledge of facts or circumstances ~~can~~ rise to the level of a CLAIM for purpose of triggering an applicable COVERAGE PERIOD. This subsection is based solely on the objective nature of information received by the PLF. ~~Covered Parties should thus be aware that any information or knowledge they may have that is not transmitted to the PLF is irrelevant to any determination made under this subsection.~~

*If facts or circumstances meet the requirements of subsection 1.b(1)(c), then any subsequent CLAIM that constitutes a SAME OR RELATED CLAIM under Section I.14 will relate back to the COVERAGE PERIOD at the time the original notice of information was provided to the PLF.*

**SAME OR RELATED CLAIMS.** *Subsection 1.b(2) states a special rule applicable when several CLAIMS arise out of the SAME OR RELATED CLAIMS. Under this rule, all such SAME OR RELATED CLAIMS are considered first made at the time the earliest of the several SAME OR RELATED CLAIMS is first made. Thus, regardless of the number of claimants asserting SAME OR RELATED CLAIMS, the number of Master Plan Years involved, or the number of transactions giving rise to the CLAIMS, all such CLAIMS are treated as first made in the earliest applicable Master Plan Year and only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE apply. There is an exception to the special rule in Subsection 1.b(2) for COVERED PARTIES who had no coverage (with the PLF or otherwise) at the time the initial CLAIM was made, but this exception does not create any additional Limits of Coverage. Pursuant to Subsection VI.2, only one Limit of Coverage would be available.*

**Scope of Duty to Defend.** *Subsection 2 defines the PLF's obligation to defend. The obligation to defend continues only until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage are exhausted. In that event, the PLF will tender control of the defense to the COVERED PARTY or excess insurance carrier, if any. The PLF's payment of the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage ends all of the PLF's duties.*

~~**Control of Defense.** Subsection 2.a allocates to the PLF control of the investigation, settlement, and defense of the CLAIM. See SECTION IX ASSISTANCE, COOPERATION AND DUTIES OF COVERED PARTY.~~

~~**Costs of Defense.** Subsection 2.b obligates the PLF to pay reasonable and necessary costs of defense. Only those expenses incurred by the PLF or with the PLF's authority are covered.~~

## SECTION V – EXCLUSIONS FROM COVERAGE

### ~~[WRONGFUL CONDUCT EXCLUSIONS]~~

1. **Fraudulent Claim Exclusion.** This Master Plan does not apply to a COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.

2. **Wrongful Conduct Exclusion.** This Master Plan does not apply to any of the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended by a VOLUNTEER LAWYER:

(a) any CLAIM arising out of or in any way connected with ~~YOU~~a VOLUNTEER LAWYER's actual or alleged criminal act or conduct;

(b) any CLAIM based on ~~YOU~~a VOLUNTEER LAWYER's actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct, or to any such act or conduct by another of which ~~YOU~~the VOLUNTEER LAWYER had personal knowledge and in which ~~you~~the VOLUNTEER LAWYER acquiesced or remained passive;

(c) any claim based on ~~YOU~~a VOLUNTEER LAWYER's intentional violation of the Oregon Rules of Professional Conduct (ORPC) or other applicable code of professional conduct, or to any such violation of such codes by another of which ~~you~~the VOLUNTEER LAWYER had personal knowledge and in which ~~YOU~~the VOLUNTEER LAWYER acquiesced or remained passive.

(d) This Plan does not apply to any CLAIM based on or arising out of ~~YOU~~a VOLUNTEER LAWYER's non-payment of a valid and enforceable lien if actual notice of such lien was provided to ~~YOU~~the VOLUNTEER LAWYER, or to anyone employed in ~~YOUR~~the VOLUNTEER LAWYER's office, prior to payment of the funds to a person or entity other than the rightful lien-holder.

~~This Master Plan does not apply to any CLAIM based on or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof;~~

### COMMENTS

*Exclusions 1 and 2 set out the circumstances in which wrongful conduct will eliminate coverage. An intent to harm is not required.*

**Voluntary Exposure to CLAIMS.** An attorney may sometimes voluntarily expose himself or herself to a CLAIM or known risk through a course of action or inaction when the attorney knows there is a more reasonable alternative means of resolving a problem. For example, an attorney might disburse settlement proceeds to a client even though the attorney knows of valid hospital, insurance company, or PIP liens, or other valid liens or claims to the funds. If the attorney disburses the proceeds to the client and a CLAIM arises from the other claimants lien holder, Exclusion 2 will apply and the CLAIM will not be covered.

**Unethical Conduct.** If a CLAIM arises that involves unethical conduct by an attorney, Exclusion 2 may also apply ~~to the conduct and the CLAIM would therefore not be covered. This can occur, f~~ or example, if an attorney violates Disciplinary Rule ORPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) or ORPC 5.5(a) (aiding a nonlawyer in the unlawful practice of law) and a CLAIM results, Exclusion 2 will apply and the CLAIM will not be covered.

*Example: Attorney A allows a title company to use his name, letterhead, or forms in connection with a real estate transaction in which Attorney A has no significant involvement. Attorney A's activities violate ORPC 8.4(a)(3) and ORPC 5.5(a). A CLAIM is made against Attorney A in connection with the real estate transaction. Because Attorney A's activities fall within the terms of Exclusion 2, there will be no coverage for the CLAIM. In addition, the CLAIM likely would not even be within the terms of the coverage grant under this Plan because the activities giving rise to the CLAIM do not fall within the definition of a COVERED ACTIVITY. The same analysis would apply if Attorney A allowed an insurance or investment company to use his name, letterhead, or forms in connection with a living trust or investment transaction in which Attorney A has no significant involvement.*

3. **Disciplinary Proceedings Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of a proceeding brought against a COVERED PARTY by the Oregon State Bar or any similar entity.

4. **Punitive Damages and Cost Award Exclusions.** This Master Plan does not apply to:

- a. That part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or
- b. Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct, false or unwarranted certification in a pleading, ~~and~~ or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### COMMENTS

*A COVERED PARTY may become subject to punitive or exemplary damages, attorney fees, costs, fines, penalties, or other sanctions in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.*

*Subsection a of Exclusion 4 applies to direct actions for punitive, exemplary or enhanced damages. It excludes coverage for that part of any CLAIM asserting such damages. In addition, such*

CLAIMS do not involve covered DAMAGES as defined in this Master Plan. If ~~YOU are the~~ PRO BONO PROGRAM is sued for punitive damages, ~~YOU are the~~ PRO BONO PROGRAM is not covered for that exposure. Similarly, ~~YOU are the~~ PRO BONO PROGRAM is not covered to the extent compensatory damages are doubled, trebled or otherwise enhanced.

Subsection b of Exclusion 4 applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. ~~It excludes coverage for any monetary sanction arising from an~~ The courts have become increasingly intolerant of attorney's' improper conduct actions in several areas including trial practice, discovery, and conflicts of interest, such as is described in OCP 17 and FRCPII. Statutes, court rules, and common law approaches imposing various monetary sanctions have been developed to deter such inappropriate conduct. The purpose of these sanctions would be threatened if the PLF were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.

~~Thus, iff~~ a COVERED PARTY causes the COVERED PARTY'S client to be subjected to a punitive damage award (based upon the client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, the PLF will cover a COVERED PARTY'S liability for the punitive damages suffered by the client. Subsection a does not apply because the action is not a direct action for punitive damages and Subsection b does not apply because the punitive damages suffered by ~~YOUR the~~ VOLUNTEER LAWYER's client are not the type of damages described in Subsection b.

On the other hand, if a COVERED PARTY causes the COVERED PARTY'S client to be subjected to an award of attorney fees, costs, fines, penalties, or other sanctions imposed because of the COVERED PARTY'S conduct, or such an award is made against the COVERED PARTY, Subsection b applies and the CLAIM for such damages (or for any related consequential damages) will be excluded.

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~~[BUSINESS ACTIVITY EXCLUSIONS]~~

5. **Business Role Exclusion.** This Master Plan does not apply to that part of any CLAIM based on or arising out of a COVERED PARTY'S conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

COMMENTS

A COVERED PARTY, in addition to his or her role as an attorney, may clothe himself or herself as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based on such status in a LAW ENTITY.

6. **Business Ownership Interest Exclusion.** This Master Plan does not apply to any CLAIM ~~by or on behalf of~~ based on or arising out of any business enterprise:

- a. In which a COVERED PARTY has an ownership interest, or in which a COVERED PARTY had an ownership interest at the time of the alleged acts, errors, or omissions on which the CLAIM is based;

b. In which a COVERED PARTY is a general partner, managing member, or employee, or in which a COVERED PARTY was a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the CLAIM is based; or

c. That is controlled, operated, or managed by a COVERED PARTY, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by a COVERED PARTY at the time of the alleged acts, errors, or omissions on which the CLAIM is based.

Ownership interest, for the purpose of this exclusion, does not include an ownership interest now or previously held by a COVERED PARTY solely as a passive investment, as long as a COVERED PARTY, those a COVERED PARTY controls, a COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of a COVERED PARTY'S household, and those with whom a COVERED PARTY is regularly engaged in the practice of law, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

*COMMENTS*

~~Intimacy with a client can increase risk of loss in two ways: (1) The attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arm's length; and (2) After a loss, the attorney may feel particularly motivated to assure the client's recovery. While the PLF is cognizant of a natural desire of attorneys to serve those with whom they are closely connected, the PLF has determined that coverage for such services should be excluded. Exclusion 6 delineates the level of intimacy required to defeat coverage. See also Exclusion 11.~~

7. **Partner and Employee Exclusion.** This Master Plan does not apply to any CLAIM made by:

a. A COVERED PARTY'S present, former, or prospective partner, employer, or employee; or

b. A present, former, or prospective officer, director, or employee of a professional corporation in which ~~YOU are or were a~~ COVERED PARTY is or was a shareholder,

unless such CLAIM arises out of a COVERED PARTY'S conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.<sup>[e1]</sup>

*COMMENTS*

*The PLF does not always cover a COVERED PARTY'S conduct in relation to the COVERED PARTY'S past, present, or prospective partners, employers, employees, and fellow shareholders, even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to a COVERED PARTY'S conduct in relation to such persons in situations in which the COVERED PARTY is acting as their attorney and they are the COVERED PARTY'S client.*

8. **ORPC 1.8 Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of any business transaction subject to ORPC 1.8(a) in which a COVERED PARTY participates with a client unless any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC-1 (attached as Exhibit A to this Master Plan) and has been

~~properly fully~~ executed ~~by you and your~~ the COVERED PARTY's client <sup>[e2]</sup> prior to the occurrence ~~business transaction~~ giving rise to the CLAIM, ~~and either:~~

~~a. — A copy of the executed disclosure form is forwarded to the PLF within 10 calendar days of execution, or~~

~~b. — If delivery of a copy of the disclosure form to the PLF within 10 calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, the COVERED PARTY may instead send the PLF an alternative letter stating: (1) the name of the client with whom the COVERED PARTY is participating in a business transaction; (2) that the COVERED PARTY has provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a); (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within 10 calendar days of execution of the disclosure letter.~~

### COMMENTS

~~**ORPC 1.** Form ORPC 1, referred to above, is attached to this Master Plan following SECTION XIV. The form includes an explanation of ORPC 1.8(a) which should be provided to the client involved in the business transaction.~~

~~— **Applicability of Exclusion.** When an attorney engages in a business transaction with a client, the attorney has an ethical duty to make certain disclosures to the client. ORPC 1.0(g) and 1.8(a) provide:~~

#### ~~RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES~~

~~(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:~~

~~— (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~— (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~— (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

#### ~~RULE 1.0(g)~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

This exclusion is not intended to be an interpretation of ORPC 1.8(a). Instead, the Master Plan ~~is~~ invoking~~invokes~~ the body of law interpreting ORPC 1.8(a) to define when the exclusion is applicable.

~~**Use of the PLF's Form Not Mandated.** Because of the obvious conflict of interest and the high duty placed on attorneys, when the exclusion applies, the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful. Form ORPC 1 is the PLF's attempt to set out an effective disclosure which will provide an adequate defense to such CLAIMS. The PLF is sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use the PLF's proposed form. YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply. Use of the PLF's form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult ORPC 1.0(g) and 1.8(a) and add any disclosures necessary to satisfy the disciplinary rules.~~

~~**Timing of Disclosure.** To be effective, it is important that the PLF can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing prior to entering into the transaction is impractical. In those circumstances, execution of the disclosure letter after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.~~

~~**Delivery to the PLF.** Following execution of the disclosure letter, a copy of the letter or an alternative letter must be delivered to the PLF in a timely manner. Failure to do so will result in any subsequent CLAIM against YOU being excluded.~~

~~**Other Disclosures.** By its terms, ORPC 1.8(a) and this exclusion apply only to business transactions with a client in which the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client. However, lawyers frequently enter into business transactions with others not recognizing that the other expects the lawyer to exercise professional judgment for his or her protection. It can be the "client's" expectation and not the lawyer's recognition that triggers application of ORPC 1.8(a) and this exclusion.~~

**9. Investment Advice Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of any act, error, or omission committed by a COVERED PARTY (or by someone for whose conduct a COVERED PARTY is legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by the COVERED PARTY constitutes a COVERED ACTIVITY described in SECTION III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f. or g of the definition of INVESTMENT ADVICE in SECTION I.10.

#### COMMENTS

~~In prior years, the PLF suffered extreme losses as a result of COVERED PARTIES engaging in INVESTMENT ADVICE activity. It was never intended that the PLF cover such activities. An INVESTMENT ADVICE exclusion was added to the Claims Made Plan in 1984. Nevertheless, losses continued in situations where the COVERED PARTY had rendered both INVESTMENT ADVICE and legal advice. In addition, some CLAIMS resulted where the attorney provided INVESTMENT ADVICE in the guise of legal advice.~~

~~Exclusion 9, first introduced to the Claims Made Plan in 1987, represented a totally new approach to this problem. Instead of excluding all INVESTMENT ADVICE, the PLF Master Plan has clearly delineated delineates specific activities which that will not be covered, whether or not legal as well as INVESTMENT ADVICE is involved. These specific activities are defined in Section I.10 under the definition of INVESTMENT ADVICE. The PLF's choice of delineated activities was guided by specific cases that exposed the PLF in situations never intended to be covered. The PLF is cognizant Master Plan takes into account that COVERED PARTIES doing structured settlements and COVERED PARTIES in business practice and tax practice legitimately engage in the rendering of general INVESTMENT ADVICE as a part of their practices. In delineating the activities to be excluded, the PLF Master Plan has attempted to retains coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e., COVERED ACTIVITIES described in Section III.3) when acting in that capacity even though the same activities would not be covered if performed in any other capacity. See the definition of INVESTMENT ADVICE in Section I.~~

Exclusion 9 applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.

~~Note that~~ Exclusion 9 could defeat coverage for an entire CLAIM even if only part of the CLAIM involved INVESTMENT ADVICE. If INVESTMENT ADVICE is in fact either the sole or a contributing cause of any resulting damage that is part of the CLAIM, the entire CLAIM is excluded.

#### ~~[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]~~

**10. Law Practice Business Activities or Benefits Exclusion.** This Master Plan does not apply to any CLAIM:

- a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.
- b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY; or
- c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.
- d. In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other



claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by the COVERED PARTY regarding the client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

~~a. — For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;~~

~~b. — Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or~~

~~e. — For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.~~

#### COMMENTS

*This Master Plan ~~is intended to cover liability for errors committed in rendering professional services. It is not intended to~~ does not cover liabilities arising out of the business aspects of the practice of law. Here, the Master Plan clarifies this distinction by excluding liabilities arising out of fee disputes whether the CLAIM seeks a return of a paid fee, cost, or disbursement. Subsection c, in addition, excludes CLAIMS for damages or the recovery of funds or property that, for whatever reason, have resulted or will result in the accrual of a benefit to any COVERED PARTY.*

*Attorneys sometimes attempt to correct their own mistakes without notifying the PLF. In some cases, the attorneys charge their clients for the time spent in correcting their prior mistakes, which can lead to a later CLAIM from the client. The better course of action is to notify the PLF of a potential CLAIM as soon as it arises and allow the PLF to hire and pay for repair counsel if appropriate. In the PLF's experience, repair counsel is usually more successful in obtaining relief from a court or an opposing party than the attorney who made the mistake. In addition, under Subsection a of this exclusion, the PLF does not cover CLAIMS from a client for recovery of fees previously paid by the client to a COVERED PARTY (including fees charged by an attorney to correct the attorney's prior mistake).*

*Example No. 1: Attorney A sues Client for unpaid fees; Client counterclaims for the return of fees already paid to Attorney A which allegedly were excessive and negligently incurred by Attorney A. Under Subsection a, there is no coverage for the CLAIM.*

*Example No. 2: Attorney B allows a default to be taken against Client, and bills an additional \$2,500 in attorney fees incurred by Attorney B in his successful effort to get the default set aside. Client pays the bill, but later sues Attorney B to recover the fees paid. Under Subsection a there is no coverage for the CLAIM.*

*Example No. 3: Attorney C writes a demand letter to Client for unpaid fees, then files a lawsuit*

for collection of the fees. Client counterclaims for unlawful debt collection. Under Subsection b., there is no coverage for the CLAIM. The same is true if Client is the plaintiff and sues for unlawful debt collection in response to the demand letter from Attorney C.

Example No. 4: Attorney D negotiates a fee and security agreement with Client on behalf of Attorney D's own firm. Other firm members, not Attorney D, represent Client. Attorney D later leaves the firm, Client disputes the fee and security agreement, and the firm sues Attorney D for negligence in representing the firm. Under Subsection b., there is no coverage for the CLAIM.

Example No. 5: Attorney E takes a security interest in stock belonging to Client as security for fees. Client fails to pay the fees and Attorney E executes on the stock and becomes the owner. Client sues for recovery of the stock and damages. Under Subsection c., there is no coverage for the CLAIM. The same is true if Attorney E receives the stock as a fee and later is sued for recovery of the stock or damages.

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**11. Family Member and Ownership Exclusion.** This Master Plan does not apply to: (a) any CLAIM based upon or arising out of a COVERED PARTY'S legal services performed by a COVERED PARTY on behalf of that COVERED PARTY'S on behalf of a COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of that COVERED PARTY'S household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest or (b) any CLAIM against a COVERED PARTY based on or arising out of another lawyer having provided legal services or representation to his or her own spouse, parent, child, step-child, sibling, or any member of his or her household, or on behalf of a business entity in which any of them individually or collectively, have a controlling interest.

#### COMMENTS

Work performed for family members is not covered under this Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise, will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.

**12. Benefit Plan Fiduciary Exclusion.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar Master Plan.

**13. Notary Exclusion.** This Master Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of a COVERED PARTY'S employee and the COVERED PARTY has no actual knowledge of such act.

#### ~~[GOVERNMENT ACTIVITY EXCLUSION]~~

**14. Government Activity Exclusion.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S conduct:

- a. As a public official or an employee of a governmental body, subdivision, or agency; or

b. In any other capacity that comes within the defense and indemnity requirements of ORS 30.285 and 30.287, or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all of the COVERED PARTY'S rights against the public body.

COMMENTS

*Subsection a applies whether or not the public official or employee is entitled to defense or indemnity from the governmental entity. Subsection b, in addition, excludes coverage for COVERED PARTIES in other relationships with a governmental entity, but only if statute, rule, or case law entitles a COVERED PARTY to defense or indemnity from the governmental entity.*

~~[HOUSE COUNSEL EXCLUSION]~~

15. House Counsel Exclusion. This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S conduct as an employee in an employer-employee relationship.

COMMENTS

*This exclusion applies to conduct as an employee even when the employee represents a third party in an attorney-client relationship as part of the employment. Examples of this application include employment by an insurance company, labor organization, member association, or governmental entity that involves representation of the rights of insureds, union or association members, clients of the employer, or the employer itself.*

~~[GENERAL TORTIOUS CONDUCT EXCLUSIONS]~~

16. General Tortious Conduct Exclusions. This Master Plan does not apply to any CLAIM against any COVERED PARTY for:

- a. Bodily injury, sickness, disease, or death of any person;
- b. Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise COVERED ACTIVITY.

COMMENTS

~~*The CLAIMS excluded are not typical errors and omissions torts and were, therefore, considered inappropriate for coverage under the Master Plan. YOU are encouraged to seek coverage for these CLAIMS through commercial insurance markets.*~~

~~*Prior to 1991 the Claims Made Plan expressly excluded "personal injury" and "advertising*~~

~~injury," defining those terms in a manner similar to their definitions in standard commercial general liability policies. The deletion of these defined terms from this Exclusion is not intended to imply that all personal injury and advertising injury CLAIMS are covered. Instead, the deletion is intended only to permit coverage for personal injury or advertising injury CLAIMS, if any, that fall within the other coverage terms of the Master Plan.~~

Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, money etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney's performance of professional services, in which event a CLAIM resulting from the loss or damage would not be excluded by Exclusion 16.

*Example No. 1: Client gives Attorney A valuable jewelry to hold for safekeeping. The jewelry is stolen or lost. There is no coverage for the value of the stolen or lost jewelry, since the loss of the property did not adversely affect the performance of professional services. Attorney A can obtain appropriate coverage for such losses from commercial insurance sources.*

*Example No. 2: Client gives Attorney B a defective ladder from which Client fell. The ladder is evidence in the personal injury case Attorney B is handling for Client. Attorney B loses the ladder. Because the ladder is lost, Client loses the personal injury case. The CLAIM for the loss of the personal injury case is covered. The damages are the difference in the outcome of the personal injury case caused by the loss of the ladder. There would be no coverage for the loss of the value of the ladder. Coverage for the value of the ladder can be obtained through commercial insurance sources.*

*Example No. 3: Client gives Attorney C important documents relevant to a legal matter being handled by Attorney C for Client. After conclusion of handling of the legal matter, the documents are lost or destroyed. Client makes a CLAIM for loss of the documents, reconstruction costs, and consequential damages due to future inability to use the documents. There is no coverage for this CLAIM, as loss of the documents did not adversely affect any professional services because the professional services had been completed. Again, coverage for loss of the property (documents) itself can be obtained through commercial general liability or other insurance or through a valuable papers endorsement to such coverage.*

~~**Child Abuse Reporting Statute.** This exclusion would ordinarily exclude coverage for the type of damages that might be alleged against an attorney for failure to comply with ORS 419B.010, the child abuse reporting statute. (It is presently uncertain whether civil liability can arise under the statute.) If there is otherwise coverage under this Master Plan for a CLAIM arising under ORS 419B.010, the PLF will not apply Exclusion 16 to the CLAIM.~~

**17. Unlawful Harassment and Discrimination Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference orientation, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.

#### COMMENTS

The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, inappropriate for coverage not covered under the Master Plan.

~~[PATENT EXCLUSION]~~

18. **Patent Exclusion.** This Master Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error, or omission committed in relation to the prosecution of a patent if ~~YOU were~~the VOLUNTEER LAWYER was not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

19. *Reserved.*

~~[CONTRACTUAL OBLIGATION EXCLUSION]~~

20. **Contractual Obligation Exclusion.** This Master Plan does not apply to any CLAIM:

a. Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by ~~YOU a COVERED PARTY~~ or someone for whose conduct ~~YOU a COVERED PARTY~~ are is legally liable, unless the —CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;

b. Any costs connected to ORS 20.160 or similar statute or rule;

c. For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or

d. Claims in contract based upon an alleged promise to obtain a certain outcome or result.

*COMMENTS*

*In the Plan, the PLF agrees to assume certain tort risks of Oregon attorneys for certain errors or omissions in the private practice of law; it does not assume the risk of making good on attorneys' contractual obligations. So, for example, an agreement to indemnify or guarantee an obligation will generally not be covered, except in the limited circumstances described in Subsection a. That subsection is discussed further below in this Comment.*

*Subsection b, while involving a statutory rather than contractual obligation, nevertheless expresses a similar concept, since under ORS 20.160 an attorney who represents a nonresident or foreign corporation plaintiff in essence agrees to guarantee payment of litigation costs not paid by his or her client.*

*Subsection c states the general rule that contractual liabilities are not covered under the PLF Plan. For example, an attorney who places an attorney fee provision in his or her retainer agreement voluntarily accepts the risk of making good on that contractual obligation. Because a client's attorney fees incurred in litigating a dispute with its attorney are not ordinarily damages recoverable in tort, they are not a risk the PLF agrees to assume. In addition, if a Covered Party agrees or represents that he or*

she will pay a claim, reduce fees, or the like, a claim based on a breach of that agreement or representation will not be covered under the Plan.

Subsection d involves a specific type of agreement or representation: an alleged promise to obtain a particular outcome or result. One example of this would be an attorney who promises to get a case reinstated or to obtain a particular favorable result at trial or in settlement. In that situation, the attorney can potentially be held liable for breach of contract or misrepresentation regardless of whether his or her conduct met the standard of care. That situation is to be distinguished from an attorney's liability in tort or under the third party beneficiary doctrine for failure to perform a particular task, such as naming a particular beneficiary in a will or filing and serving a complaint within the statute of limitations, where the liability, if any, is not based solely on a breach of the attorney's guarantee, promise or representation.

Attorneys sometimes act in one of the special capacities for which coverage is provided under Section III.3 (i.e., as a named personal representative, administrator, conservator, executor, guardian, or trustee except BUSINESS TRUSTEE). If the attorney is required to sign a bond or any surety, guaranty, warranty, joint control, or similar agreement while carrying out one of these special capacities, Exclusion 20.a does not apply, although b, c, or d of this Exclusion may be applicable.

On the other hand, when an attorney is acting in an ordinary capacity not within the provisions of Section III.3, Exclusion 20 does apply to any CLAIM based on or arising out of any bond or any surety, guaranty, warranty, joint control, indemnification, or similar agreement signed by the attorney or by someone for whom the attorney is legally liable. In these situations, attorneys should not sign such bonds or agreements. For example, if an attorney is acting as counsel to a personal representative and the personal representative is required to post a bond, the attorney should resist any attempt by the bonding company to require the attorney to co-sign as a surety for the personal representative or to enter into a joint control or similar agreement that requires the attorney to review, approve, or control expenditures by the personal representative. If the attorney signs such an agreement and a CLAIM is later made by the bonding company, the estate, or another party, Exclusion 20 applies and there will be no coverage for the CLAIM.

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~~[BANKRUPTCY TRUSTEE EXCLUSION]~~

**21. Bankruptcy Trustee Exclusion.** This Master Plan does not apply to any CLAIM arising out of ~~YOUR~~a COVERED PARTY's activity (or the activity of someone for whose conduct ~~you~~are COVERED PARTY is legally liable) as a bankruptcy trustee.

**22. Confidential or Private Data Exclusion.** This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

COMMENTS

There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or

intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a COVERED PARTY; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a COVERED PARTY or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.

There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.

**223. Activities Outside Pro Bono Program Exclusion.** This Master Plan does not apply to any CLAIM against a COVERED PARTY arising from or related to work or services beyond the scope of activities assigned to the COVERED PARTY by the PRO BONO PROGRAM.

#### COMMENTS

*Activities by a volunteer lawyer which are outside of the scope of activities assigned to the lawyer by the pro bono program for which the lawyer has volunteered do not constitute a COVERED ACTIVITY under this Master Plan and will also be excluded by this exclusion. The term "PRO BONO PROGRAM" as used in this exclusion is defined at SECTION I – DEFINITIONS.*

*The various exclusions which follow in this subsection were adopted from the PLF's standard Coverage Plan. Many of the exclusions are, by their nature, unlikely to apply to a volunteer attorney working for a pro bono program. The fact that a type of activity is mentioned in these exclusions does not imply that such activity will be a COVERED ACTIVITY under this Master Plan.*

#### ~~[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]~~

~~23. — This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.~~

#### ~~COMMENTS~~

~~— There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper~~

~~safeguarding or disposal of paper records would also fall within this exclusion.~~

~~—————There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.~~

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## SECTION VI – LIMITS OF COVERAGE AND CLAIMS EXPENSE ALLOWANCE

### 1. Limits for This Master Plan

**a. Coverage Limits.** The PLF’s maximum liability under this Master Plan is \$300,000 DAMAGES and EXCESS CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under SECTION XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the PLF’s Limit of Coverage.

**b. Claims Expense Allowance Limits.** In addition to the Limit of Coverage stated in SECTION VI.1.a above, there is a single CLAIMS EXPENSE ALLOWANCE of \$50,000 for CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under SECTION XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the CLAIMS EXPENSE ALLOWANCE. In the event CLAIMS EXPENSE exceeds the CLAIMS EXPENSE ALLOWANCE, the Limit of Coverage will be reduced by the amount of EXCESS CLAIMS EXPENSE incurred. The CLAIMS EXPENSE ALLOWANCE is not available to pay DAMAGES or settlements.

**c. No Consequential Damages.** No person or entity may recover any damages for breach of any provision in this Master Plan except those specifically provided for in this Master Plan.

### 2. Limits Involving Same or Related Claims Under Multiple PLF Plans

If this Master Plan and one or more other Master Plans or Claims Made Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, PRO BONO PROGRAMS, or LAW ENTITIES involved, only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE will apply. Notwithstanding the preceding sentence, if the SAME OR RELATED CLAIMS are brought against two or more separate LAW ENTITIES or PRO BONO PROGRAMS, each of which requests and is entitled to separate defense counsel, the PLF will make one CLAIMS EXPENSE ALLOWANCE available to each of the separate LAW ENTITIES or PRO BONO PROGRAMS requesting a separate allowance. For purposes of this provision, whether LAW ENTITIES or PRO BONO PROGRAMS are separate is determined as of the time of the COVERED ACTIVITIES that are alleged in the CLAIMS. No LAW ENTITY, PRO BONO PROGRAM, or group of LAW ENTITIES or PRO BONO PROGRAMS practicing together as a single firm, will be entitled to more than one CLAIMS EXPENSE ALLOWANCE under this provision. The CLAIMS EXPENSE ALLOWANCE granted



will be available solely for the defense of the LAW ENTITY or PRO BONO PROGRAM requesting it.

## COMMENTS

*The PLF Claims Made Plan is intended to provide a basic “floor” level of coverage for all Oregon attorneys engaged in the private practice of law whose principal offices are in Oregon. Likewise, the Pro Bono Master Plan is intended to provide basic limited coverage. Because of this, there is a general prohibition against the stacking of either Limits of Coverage or CLAIMS EXPENSE ALLOWANCES. Except for the provision involving CLAIMS EXPENSE ALLOWANCES under Subsection 2, only one Limit of Coverage and CLAIMS EXPENSE ALLOWANCE will ever be paid under any one Claims Made Plan or Pro Bono Master Plan issued to a COVERED PARTY in any one MASTER PLAN YEAR, regardless of the circumstances. Limits of Coverage or CLAIMS EXPENSE ALLOWANCES in multiple individual Claims Made Plans and Pro Bono Master Plans do not stack for any CLAIMS that are “related.” As the definition of SAME OR RELATED CLAIMS and its Comments and Examples demonstrate, the term “related” has a broad meaning when determining the number of Limits of Coverage and CLAIMS EXPENSE ALLOWANCES potentially available. This broad definition is designed to ensure the long-term economic viability of the PLF by protecting it from multiple limits exposures, ensuring fairness for all Oregon attorneys who are paying annual assessments, and keeping the overall coverage affordable.*

*The Plan grants a limited exception to the one-limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the Plan allows for a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.*

*The Limits of Coverage apply to claims against more than one COVERED PARTY so that naming more than one VOLUNTEER ATTORNEY, the PRO BONO PROGRAM, or other COVERED PARTIES as defendants does not increase the amount available.*<sup>[e3]</sup>

~~*Effective January 1, 2005, the PLF has created a limited exception to the one limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY or PRO BONO PROGRAM, and one of the LAW ENTITIES or PRO BONO PROGRAMS is entitled to and requests a separate defense of the SUIT, then the PLF will allow a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY or PRO BONO PROGRAM.*~~

*The coverage provisions and limitations provided in this Master Plan are the absolute maximum amounts that can be recovered under the Master Plan. Therefore, no person or party is entitled to recover any consequential damages for breach of the Master Plan.*

*Example No. 1: Attorney A performed COVERED ACTIVITIES for a client while she was at two different law firms. Client sues A and both firms. Both firms request separate counsel, each one contending most of the alleged errors took place while A was at the other firm. The defendants are collectively entitled to a maximum of one \$300,000 Limit of Coverage and two CLAIMS EXPENSE ALLOWANCES. For purposes of this provision, Attorney A (or, if applicable, her professional corporation) is not a separate LAW ENTITY from the firm at which she worked. Accordingly, two, not three, CLAIMS EXPENSE ALLOWANCES are potentially available.*

*Example No. 2: Attorney A is a sole practitioner, practicing as an LLC, but also working of counsel for a partnership of B and C. While working of counsel, A undertook a case which he*

*concluded involved special issues requiring the expertise of Attorney D, from another firm. D and C work together in representing the client and commit errors in handling the case. Two CLAIMS EXPENSE ALLOWANCES are potentially available. There are only two separate firms – the BC partnership and D’s firm.*

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## **SECTION VII - NOTICE OF CLAIMS**

**1.** The COVERED PARTY must, as a condition precedent to the right of protection afforded by this coverage, give the PLF, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY. In the event a SUIT is brought against the COVERED PARTY, the COVERED PARTY must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.

**2.** If the COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Master Plan, the COVERED PARTY must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:

- a.** The specific act, error, or omission;
- b.** DAMAGES and any other injury that has resulted or may result; and
- c.** The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.

**3.** If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under subsection 1. or 2. above, the COVERED PARTY’S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

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## **SECTION VIII – COVERAGE DETERMINATIONS**

**1.** This Master Plan is governed by the laws of the state of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Master Plan. Any disputes as to the applicability, interpretation, or enforceability of this Master Plan, or any other issue pertaining to the provision of benefits under this Master Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the state of Oregon which will have exclusive jurisdiction and venue of such disputes at the trial level.

**2.** The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.

**3.** In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF’s payment. In the event it is determined that

this Master Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

4. The bankruptcy or insolvency of a COVERED PARTY does not relieve the PLF of its obligations under this Master Plan.

#### COMMENTS

~~Historically, Section VIII provided for resolution of coverage disputes by arbitration. After 25 years of resolving disputes in this manner, the PLF concluded it would be more beneficial to COVERED PARTIES and the PLF to try these matters to a court where appeals are available and precedent can be established.~~

~~In the event of a dispute over coverage, Until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute until the coverage dispute is concluded. The PLF recognizes there may occasionally be exceptional circumstances making a coverage determination impracticable prior to a payment by the PLF of a portion or all of the PLF's Limit of Coverage toward resolution of a CLAIM. For example, a claimant may make a settlement demand having a deadline for acceptance that would expire before coverage could be determined, or a court might determine on the facts before it that a binding determination on the relevant coverage issue should not be made while the CLAIM is pending. In some of these exceptional circumstances, the PLF may at its option pay a portion or all of the Limit of Coverage before the dispute concerning the question of whether this Master Plan is applicable to the CLAIM is decided. If the PLF pays a portion or all of the Limit of Coverage and the court subsequently determines that this Master Plan is not applicable to the CLAIM, then the COVERED PARTY or others on whose behalf the payment was made must reimburse the PLF, in order to prevent unjust enrichment and protect the solvency and financial integrity of the PLF. For a COVERED PARTY'S duties in this situation, see Section IX.3.~~

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#### SECTION IX - ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

1. As a condition of coverage under this Master Plan, the COVERED PARTY will, without charge to the PLF, cooperate with the PLF and will:

- a. Provide to the PLF, within 30 days after written request, sworn statements providing full disclosure concerning any CLAIM or any aspect thereof;
- b. Attend and testify when requested by the PLF;
- c. Furnish to the PLF, within 30 days after written request, all files, records, papers, and documents that may relate to any CLAIM against the COVERED PARTY;
- d. Execute authorizations, documents, papers, loan receipts, releases, or waivers when so requested by the PLF;
- e. Submit to arbitration of any CLAIM when requested by the PLF;

**f.** Permit the PLF to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense, and settlement of all CLAIMS;

**g.** Not communicate with any person other than the PLF or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without the PLF's written consent;

**h.** Assist, cooperate, and communicate with the PLF in any other way necessary to investigate, defend, repair, settle, or otherwise resolve any CLAIM against the COVERED PARTY.

**2.** To the extent the PLF makes any payment under this Plan, it will be subrogated to any COVERED PARTY's rights against third parties to recover all or part of these sums. When requested, every COVERED PARTY must assist the PLF in bringing any subrogation or similar claim. The PLF's subrogation or similar rights will not be asserted against any non-attorney employee of ~~YOURS or YOUR law firm~~ COVERED PARTY except for CLAIMS arising from intentional, dishonest, fraudulent, or malicious conduct of such person.

**3.** The COVERED PARTY may not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense with respect to a CLAIM.

**4.** In the event the PLF proposes in writing a settlement to be funded by the PLF but subject to the COVERED PARTY's being obligated to reimburse the PLF if it is later determined that the Master Plan did not cover all or part of the CLAIM settled, the COVERED PARTY must advise the PLF in writing that the COVERED PARTY:

**a.** Agrees to the PLF's proposal, or

**b.** Objects to the PLF's proposal.

The written response must be made by the COVERED PARTY as soon as practicable and, in any event, must be received by the PLF no later than one business day (and at least 24 hours) before the expiration of any time-limited demand for settlement. A failure to respond, or a response that fails to unequivocally object to the PLF's written proposal, constitutes an agreement to the PLF's proposal. A response objecting to the settlement relieves the PLF of any duty to settle that might otherwise exist.

#### COMMENTS

*Subsection 4 addresses a problem that arises only when the determination of coverage prior to trial or settlement of the underlying claim is impracticable either because litigation of the coverage issue is not possible, permissible, or advisable, or because a pending trial date or time limit demand presents too short a period for resolution of the coverage issue prior to settlement or trial. In these circumstances, to avoid any argument that the PLF is acting as a volunteer, the PLF needs specific advice from the COVERED PARTY (or anyone claiming through the COVERED PARTY) either unequivocally agreeing that the PLF may proceed with the proposed settlement (i.e., waiving the volunteer argument) or unequivocally objecting to the proposed settlement (i.e., waiving any right to contend that the PLF has a duty to settle). ~~While the PLF recognizes the requirement of an unequivocal response in some circumstances forces the COVERED PARTY (or anyone claiming through the COVERED PARTY) to~~*

~~make a difficult judgment.~~ *The exigencies of the situation require an unequivocal response so the PLF will know whether it can proceed with settlement without forfeiting its right to reimbursement to the extent the CLAIM is not covered.*

~~The obligations of the Covered Party under Section IX as well as the other Sections of the Master Plan are to be performed without charge to the PLF.~~

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## SECTION X — ACTIONS BETWEEN THE PLF AND COVERED PARTIES

1. No legal action in connection with this Master Plan will be brought against the PLF unless the COVERED PARTY has fully complied with all terms of this Master Plan.
2. The PLF may bring legal action in connection with this Master Plan against a COVERED PARTY if:
  - a. The PLF pays a CLAIM under another Master Plan issued by the PLF;
  - b. A COVERED PARTY under this Master Plan is alleged to be liable for all or part of the damages paid by the PLF;
  - c. As between the COVERED PARTY under this Master Plan and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY under this Master Plan for contribution, indemnity, or otherwise, for all or part of the damages paid; and
  - d. Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Master Plan.
3. In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate, up to the full amount the PLF has paid under one or more other Master Plans issued by the PLF. However, this Subsection will not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery that would entitle the COVERED PARTY to indemnity under this Master Plan if the PLF's action were successful.

### COMMENTS

*Under certain circumstances, a CLAIM against a COVERED PARTY may not be covered because of an exclusion or other applicable provision. However, in some cases the PLF may be required to pay the CLAIM nonetheless because of the PLF's obligation to another COVERED PARTY under the terms of his or her Claims Made Plan or Pro Bono Master Plan.*

*Example No. 1: Attorney A misappropriates trust account funds belonging to Client X. Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the CLAIM under his Master Plan, but Attorney B has coverage for her liability under her Master Plan. The PLF pays the CLAIM under Attorney B's Master Plan. Section X.2 of Attorney A's Master Plan makes clear the PLF has the right to sue Attorney A for the damages the PLF paid under Attorney B's Master Plan.*

*Example No. 2: Same facts as the prior example, except that the PLF loans funds to Attorney B under terms that obligate Attorney B to repay the loan to the extent she recovers damages from Attorney A in an action for indemnity. Section X.2 of Attorney A's Master Plan makes clear that the PLF has the right pursuant to such arrangement with Attorney B to participate in her action against Attorney A.*

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## **SECTION XI - RELATION OF PRO BONO MASTER PLAN COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE**

1. If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify that also applies to any loss or CLAIM covered by this Master Plan, the PLF will not be liable under the Master Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage of this Master Plan.
2. This Master Plan shall not apply to any CLAIM which is covered by any PLF Claims Made Plan which has been issued to any COVERED PARTY, regardless of whether or not the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage available to defend against or satisfy such CLAIM are sufficient to pay any liability or CLAIM or whether or not the underlying limits or terms of such PLF Claims Made Plan are different from this Master Plan.

### *COMMENTS*

*As explained in the Preface, ~~this~~ Master Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Master Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under the Lamb-Weston v. Oregon Automobile Ins. Co. 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## **SECTION XII – WAIVER AND ESTOPPEL**

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Master Plan nor will the terms of this Master Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## **SECTION XIII — ASSIGNMENT**

The interest hereunder of any COVERED PARTY is not assignable.

## **SECTION XIV – TERMINATION**

This Master Plan will terminate immediately and automatically in the event ~~YOU are~~ [the PRO BONO PROGRAM](#) is no longer certified as an OSB Pro Bono Program by the Oregon State Bar.

~~Dear [Client]:~~

~~This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.~~

~~The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, **include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable.**~~

~~Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.~~

~~I enclose an article "Business Deals Can Cause Problems," which contains additional information. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.~~

~~Very truly yours,~~

~~[Attorney Name and Signature]~~

~~I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:~~

~~\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
[Client's Signature] [Date]~~

~~Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.~~

~~**BUSINESS DEALS CAN CAUSE PROBLEMS** (Complying With ORPC 1.8(a))~~

~~By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar~~

~~Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.~~

~~ORPC 1.8(a) and 1.0(g) read as follows:~~

~~*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*~~

~~(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:~~

~~(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

~~*ORPC 1.0 Terminology*~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the~~

~~attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.~~



~~A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.~~

~~Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.~~

~~Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.~~

~~In order to avoid the ethical problems addressed by the conflict-of-interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.~~

**Oregon State Bar  
Professional Liability Fund  
Financial Statements  
6/30/2015**

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**Oregon State Bar  
Professional Liability Fund  
Combined Primary and Excess Programs  
Statement of Net Position  
6/30/2015**

| <u>ASSETS</u>  |                               |                               |
|--|-------------------------------|-------------------------------|
|  | <u>THIS YEAR</u>              | <u>LAST YEAR</u>              |
| Cash   | \$3,374,536.69                | \$1,657,747.77                |
| Investments at Fair Value  | 50,855,314.47                 | 50,661,877.02                 |
| Assessment Installment Receivable                                    | 4,804,121.75                  | 4,748,576.03                  |
| Due from Reinsurers  | 548,664.02                    | 708,820.25                    |
| Other Current Assets   | 138,842.74                    | 95,921.39                     |
| Net Fixed Assets   | 835,748.81                    | 872,703.06                    |
| Claim Receivables  | 69,922.49                     | 35,009.00                     |
| Other Long Term Assets   | <u>6,900.00</u>               | <u>11,167.40</u>              |
| <b>TOTAL ASSETS</b>  | <b><u>\$60,634,050.97</u></b> | <b><u>\$58,791,821.92</u></b> |
| <br><u>LIABILITIES AND FUND POSITION</u>                             |                               |                               |
|  | <u>THIS YEAR</u>              | <u>LAST YEAR</u>              |
| <b>Liabilities:</b>  |                               |                               |
| Accounts Payable and Other Current Liabilities                       | \$78,979.91                   | \$132,913.85                  |
| Due to Reinsurers  | \$701,180.99                  | \$978,150.04                  |
| Liability for Compensated Absences                                   | 354,702.17                    | 370,817.99                    |
| Liability for Indemnity  | 14,300,000.00                 | 12,300,000.00                 |
| Liability for Claim Expense  | 14,700,110.00                 | 14,200,000.00                 |
| Liability for Future ERC Claims                                      | 2,700,000.00                  | 2,400,000.00                  |
| Liability for Suspense Files   | 1,500,000.00                  | 1,500,000.00                  |
| Liability for Future Claims Administration (AOE)                     | 2,500,000.00                  | 2,300,000.00                  |
| Excess Ceding Commission Allocated for Rest of Year                  | 380,951.26                    | 404,875.63                    |
| Assessment and Installment Service Charge Allocated for Rest of Year | <u>12,293,143.33</u>          | <u>12,474,632.33</u>          |
| <b>Total Liabilities</b>   | <b><u>\$49,509,067.66</u></b> | <b><u>\$47,061,389.84</u></b> |
| <b>Change in Net Position:</b>                                       |                               |                               |
| Retained Earnings (Deficit) Beginning of the Year                    | \$10,928,972.39               | \$9,270,287.61                |
| Year to Date Net Income (Loss)                                       | <u>196,010.92</u>             | <u>2,460,144.47</u>           |
| <b>Net Position</b>  | <b><u>\$11,124,983.31</u></b> | <b><u>\$11,730,432.08</u></b> |
| <b>TOTAL LIABILITIES AND FUND POSITION</b>                           | <b><u>\$60,634,050.97</u></b> | <b><u>\$58,791,821.92</u></b> |

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Revenues, Expenses, and Changes in Net Position  
6 Months Ended 6/30/2015**

|                                      | YEAR<br>TO DATE<br><u>ACTUAL</u> | YEAR<br>TO DATE<br><u>BUDGET</u> | <u>VARIANCE</u>              | YEAR<br>TO DATE<br><u>LAST YEAR</u> | <u>ANNUAL<br/>BUDGET</u>      |
|--------------------------------------|----------------------------------|----------------------------------|------------------------------|-------------------------------------|-------------------------------|
| <b><u>REVENUE</u></b>                |                                  |                                  |                              |                                     |                               |
| Assessments                          | \$12,125,809.84                  | \$12,433,750.02                  | \$307,940.18                 | \$12,307,728.34                     | \$24,867,500.00               |
| Installment Service Charge           | 167,333.50                       | 167,500.02                       | 166.52                       | 166,904.00                          | 335,000.00                    |
| Other Income                         | 54,589.72                        | 0.00                             | (54,589.72)                  | 35,042.45                           | 0.00                          |
| Investment Return                    | <u>1,064,577.23</u>              | <u>1,236,441.00</u>              | <u>171,863.77</u>            | <u>2,428,237.62</u>                 | <u>2,472,882.00</u>           |
| <b>TOTAL REVENUE</b>                 | <b><u>\$13,412,310.29</u></b>    | <b><u>\$13,837,691.04</u></b>    | <b><u>\$425,380.75</u></b>   | <b><u>\$14,937,912.41</u></b>       | <b><u>\$27,675,382.00</u></b> |
| <b><u>EXPENSE</u></b>                |                                  |                                  |                              |                                     |                               |
| <b>Provision For Claims:</b>         |                                  |                                  |                              |                                     |                               |
| New Claims at Average Cost           | \$8,862,000.00                   |                                  |                              | \$9,198,000.00                      |                               |
| Actuarial Adjustment to Reserves     | 940,670.98                       |                                  |                              | 71,374.66                           |                               |
| Coverage Opinions                    | 38,254.86                        |                                  |                              | 33,234.21                           |                               |
| General Expense                      | 46,175.86                        |                                  |                              | 11,464.17                           |                               |
| Less Recoveries & Contributions      | (4,031.30)                       |                                  |                              | 19,725.57                           |                               |
| Budget for Claims Expense            |                                  | <u>\$10,231,200.00</u>           |                              |                                     | <u>\$20,462,400.00</u>        |
| <b>Total Provision For Claims</b>    | <b><u>\$9,883,070.40</u></b>     | <b><u>\$10,231,200.00</u></b>    | <b><u>\$348,129.60</u></b>   | <b><u>\$9,333,798.61</u></b>        | <b><u>\$20,462,400.00</u></b> |
| <b>Expense from Operations:</b>      |                                  |                                  |                              |                                     |                               |
| Administrative Department            | \$1,200,464.83                   | \$1,282,707.00                   | \$82,242.17                  | \$1,175,819.14                      | \$2,565,413.93                |
| Accounting Department                | 362,115.78                       | 400,994.46                       | 38,878.68                    | 303,142.95                          | 801,988.75                    |
| Loss Prevention Department           | 947,211.45                       | 1,103,681.46                     | 156,470.01                   | 891,900.59                          | 2,207,362.28                  |
| Claims Department                    | 1,172,492.84                     | 1,341,719.46                     | 169,226.62                   | 1,287,201.24                        | 2,683,438.19                  |
| Allocated to Excess Program          | (474,207.90)                     | (474,207.90)                     | 0.00                         | (560,394.48)                        | (948,416.00)                  |
| <b>Total Expense from Operations</b> | <b><u>\$3,208,077.00</u></b>     | <b><u>\$3,654,894.48</u></b>     | <b><u>\$446,817.48</u></b>   | <b><u>\$3,097,669.44</u></b>        | <b><u>\$7,309,787.15</u></b>  |
| Contingency (4% of Operating Exp)    | \$0.00                           | \$122,568.48                     | \$122,568.48                 | \$0.00                              | \$245,137.00                  |
| Depreciation and Amortization        | \$81,887.25                      | \$84,900.00                      | \$3,012.75                   | \$83,352.75                         | \$169,800.00                  |
| Allocated Depreciation               | (8,490.00)                       | (8,490.00)                       | 0.00                         | (12,183.00)                         | (16,980.00)                   |
| <b>TOTAL EXPENSE</b>                 | <b><u>\$13,164,544.65</u></b>    | <b><u>\$14,085,072.96</u></b>    | <b><u>\$920,528.31</u></b>   | <b><u>\$12,502,637.80</u></b>       | <b><u>\$28,170,144.15</u></b> |
| <b>NET POSITION - INCOME (LOSS)</b>  | <b><u>\$249,270.64</u></b>       | <b><u>(\$248,381.94)</u></b>     | <b><u>(\$497,652.58)</u></b> | <b><u>\$2,435,274.61</u></b>        | <b><u>(\$496,762.15)</u></b>  |

**Oregon State Bar  
Professional Liability Fund  
Primary Program  
Statement of Operating Expense  
6 Months Ended 6/30/2015**

| <u>EXPENSE:</u>                       | <u>CURRENT<br/>MONTH</u>   | <u>YEAR<br/>TO DATE<br/>ACTUAL</u> | <u>YEAR<br/>TO DATE<br/>BUDGET</u> | <u>VARIANCE</u>            | <u>YEAR<br/>TO DATE<br/>LAST YEAR</u> | <u>ANNUAL<br/>BUDGET</u>     |
|---------------------------------------|----------------------------|------------------------------------|------------------------------------|----------------------------|---------------------------------------|------------------------------|
| Salaries                              | \$328,689.21               | \$1,950,377.68                     | \$2,193,908.94                     | \$243,531.26               | \$2,061,763.92                        | \$4,387,817.84               |
| Benefits and Payroll Taxes            | 107,254.72                 | 751,797.24                         | 826,803.12                         | 75,005.88                  | 758,564.30                            | 1,653,606.07                 |
| Investment Services                   | 9,543.00                   | 19,103.00                          | 19,999.98                          | 896.98                     | 13,839.75                             | 40,000.00                    |
| Legal Services                        | 1,785.00                   | 17,811.67                          | 4,999.98                           | (12,811.69)                | 1,476.00                              | 10,000.00                    |
| Financial Audit Services              | 0.00                       | 22,800.00                          | 13,000.02                          | (9,799.98)                 | 13,000.00                             | 26,000.00                    |
| Actuarial Services                    | 2,747.50                   | 14,010.00                          | 14,650.02                          | 640.02                     | 11,340.00                             | 29,300.00                    |
| Information Services                  | 8,231.35                   | 28,136.85                          | 55,500.00                          | 27,363.15                  | 25,328.24                             | 111,000.00                   |
| Document Scanning Services            | 0.00                       | 1,595.81                           | 32,500.02                          | 30,904.21                  | 2,096.48                              | 65,000.00                    |
| Other Professional Services           | 21,155.51                  | 81,023.18                          | 50,245.74                          | (30,777.44)                | 52,065.99                             | 100,491.50                   |
| Staff Travel                          | 2,941.85                   | 7,993.25                           | 15,325.08                          | 7,331.83                   | 9,476.75                              | 30,650.00                    |
| Board Travel                          | 9,192.39                   | 19,675.40                          | 23,074.98                          | 3,399.58                   | 15,301.49                             | 46,150.00                    |
| NABRICO                               | 0.00                       | 677.75                             | 9,325.02                           | 8,647.27                   | 2,707.34                              | 18,650.00                    |
| Training                              | 1,233.77                   | 10,862.31                          | 11,000.04                          | 137.73                     | 12,217.14                             | 22,000.00                    |
| Rent                                  | 43,418.92                  | 259,551.02                         | 260,032.50                         | 481.48                     | 255,715.24                            | 520,065.00                   |
| Printing and Supplies                 | 5,910.02                   | 39,559.21                          | 39,999.96                          | 440.75                     | 34,825.00                             | 80,000.00                    |
| Postage and Delivery                  | 3,584.19                   | 13,843.64                          | 14,175.00                          | 331.36                     | 11,921.10                             | 28,350.00                    |
| Equipment Rent & Maintenance          | 1,332.51                   | 22,558.53                          | 24,750.00                          | 2,191.47                   | 21,882.12                             | 49,500.00                    |
| Telephone                             | 5,195.50                   | 24,770.71                          | 24,780.00                          | 9.29                       | 23,381.48                             | 49,560.00                    |
| L P Programs (less Salary & Benefits) | 25,641.98                  | 175,473.86                         | 230,747.28                         | 55,273.42                  | 167,886.64                            | 461,494.00                   |
| Defense Panel Training                | 703.74                     | 1,733.26                           | 32,461.26                          | 30,728.00                  | 76.99                                 | 64,922.30                    |
| Bar Books Grant                       | 16,666.67                  | 100,000.02                         | 100,000.02                         | 0.00                       | 100,000.02                            | 200,000.00                   |
| Insurance                             | 3,318.33                   | 20,888.45                          | 20,947.20                          | 58.75                      | 8,221.00                              | 41,894.44                    |
| Library                               | 2,027.52                   | 12,374.84                          | 19,500.00                          | 7,125.16                   | 18,265.59                             | 39,000.00                    |
| Subscriptions, Memberships & Other    | 2,264.05                   | 79,426.51                          | 80,376.00                          | 949.49                     | 25,234.78                             | 160,752.00                   |
| Allocated to Excess Program           | (79,034.65)                | (474,207.90)                       | (474,207.90)                       | 0.00                       | (560,394.48)                          | (948,416.00)                 |
| <b>TOTAL EXPENSE</b>                  | <b><u>\$523,803.08</u></b> | <b><u>\$3,201,836.29</u></b>       | <b><u>\$3,643,894.26</u></b>       | <b><u>\$442,057.97</u></b> | <b><u>\$3,086,192.88</u></b>          | <b><u>\$7,287,787.15</u></b> |

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Revenue, Expenses, and Changes in Net Position  
6 Months Ended 6/30/2015**

|                                     | YEAR<br>TO DATE<br><u>ACTUAL</u> | YEAR<br>TO DATE<br><u>BUDGET</u> | <u>VARIANCE</u>           | YEAR<br>TO DATE<br><u>LAST YEAR</u> | <u>ANNUAL<br/>BUDGET</u>    |
|-------------------------------------|----------------------------------|----------------------------------|---------------------------|-------------------------------------|-----------------------------|
| <b><u>REVENUE</u></b>               |                                  |                                  |                           |                                     |                             |
| Ceding Commission                   | \$380,951.27                     | \$379,999.98                     | (\$951.29)                | \$404,875.63                        | \$760,000.00                |
| Prior Year Adj. (Net of Reins.)     | 887.07                           | 0.00                             | (887.07)                  | 3,446.70                            | 0.00                        |
| Installment Service Charge          | 40,447.00                        | 21,000.00                        | (19,447.00)               | 39,808.00                           | 42,000.00                   |
| Investment Return                   | <u>39,706.89</u>                 | <u>93,065.52</u>                 | <u>53,358.63</u>          | <u>217,660.37</u>                   | <u>186,131.00</u>           |
| <b>TOTAL REVENUE</b>                | <b><u>\$461,992.23</u></b>       | <b><u>\$494,065.50</u></b>       | <b><u>\$32,073.27</u></b> | <b><u>\$665,790.70</u></b>          | <b><u>\$988,131.00</u></b>  |
| <b><u>EXPENSE</u></b>               |                                  |                                  |                           |                                     |                             |
| Operating Expenses (See Page 6)     | \$506,761.95                     | \$499,457.94                     | (\$7,304.01)              | \$628,737.84                        | \$998,916.00                |
| Allocated Depreciation              | <u>\$8,490.00</u>                | <u>\$8,490.00</u>                | <u>\$0.00</u>             | <u>\$12,183.00</u>                  | <u>\$16,980.00</u>          |
| <b>NET POSITION - INCOME (LOSS)</b> | <b><u>(\$53,259.72)</u></b>      | <b><u>(\$13,882.44)</u></b>      | <b><u>\$39,377.28</u></b> | <b><u>\$24,869.86</u></b>           | <b><u>(\$27,765.00)</u></b> |

**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Statement of Operating Expense  
6 Months Ended 6/30/2015**

|                                | <u>CURRENT</u><br><u>MONTH</u> | <u>YEAR</u><br><u>TO DATE</u><br><u>ACTUAL</u> | <u>YEAR</u><br><u>TO DATE</u><br><u>BUDGET</u> | <u>VARIANCE</u>            | <u>YEAR</u><br><u>TO DATE</u><br><u>LAST YEAR</u> | <u>ANNUAL</u><br><u>BUDGET</u> |
|--------------------------------|--------------------------------|--|--|----------------------------|---|--------------------------------|
| <b><u>EXPENSE:</u></b>         |                                |  |  |                            |   |                                |
| Salaries                       | \$44,559.08                    | \$267,354.48                                   | \$267,354.48                                   | \$0.00                     | \$349,146.60                                      | \$534,709.00                   |
| Benefits and Payroll Taxes     | 15,961.66                      | 95,769.96                                      | 95,770.02                                      | 0.06                       | 129,313.20  | 191,540.00                     |
| Investment Services            | 457.00                         | 897.00   | 1,249.98                                       | 352.98                     | 1,160.25  | 2,500.00                       |
| Office Expense                 | 0.00                           | 0.00   | 0.00   | 0.00                       | 0.00  | 0.00                           |
| Allocation of Primary Overhead | 18,513.91                      | 111,083.46                                     | 111,083.46                                     | 0.00                       | 135,203.04  | 222,167.00                     |
| Reinsurance Placement & Travel | 3,652.83                       | 5,957.55                                       | 12,499.98                                      | 6,542.43                   | 10,614.75   | 25,000.00                      |
| Training                       | 0.00                           | 0.00   | 250.02   | 250.02                     | 0.00  | 500.00                         |
| Printing and Mailing           | 0.00                           | 4,915.65                                       | 2,749.98                                       | (2,165.67)                 | 0.00  | 5,500.00                       |
| Program Promotion              | 1,110.00                       | 13,730.05                                      | 7,500.00                                       | (6,230.05)                 | 3,300.00  | 15,000.00                      |
| Other Professional Services    | 0.00                           | 299.30   | 1,000.02                                       | 700.72                     | 0.00  | 2,000.00                       |
| Software Development           | <u>2,513.70</u>                | <u>6,754.50</u>                                | <u>0.00</u>                                    | <u>(6,754.50)</u>          | <u>0.00</u>                                       | <u>0.00</u>                    |
| <b>TOTAL EXPENSE</b>           | <b><u>\$86,768.18</u></b>      | <b><u>\$506,761.95</u></b>                     | <b><u>\$499,457.94</u></b>                     | <b><u>(\$7,304.01)</u></b> | <b><u>\$628,737.84</u></b>                        | <b><u>\$998,916.00</u></b>     |

**Oregon State Bar  
Professional Liability Fund  
Combined Investment Schedule  
6 Months Ended 6/30/2015**

|  | CURRENT MONTH<br><u>THIS YEAR</u> | YEAR TO DATE<br><u>THIS YEAR</u> | CURRENT MONTH<br><u>LAST YEAR</u> | YEAR TO DATE<br><u>LAST YEAR</u> |
|--|-----------------------------------|----------------------------------|-----------------------------------|----------------------------------|
| <b>Dividends and Interest:</b>               |                                   |                                  |                                   |                                  |
| Short Term Bond Fund                         | \$7,318.11                        | \$61,943.88                      | \$6,956.69                        | \$70,358.70                      |
| Intermediate Term Bond Funds                 | 34,139.36                         | 199,878.85                       | 57,812.29                         | 143,644.20                       |
| Domestic Common Stock Funds                  | 41,727.66                         | 91,320.86                        | 40,411.26                         | 158,733.23                       |
| International Equity Fund                    | 0.00                              | 0.00                             | 0.00                              | 0.00                             |
| Real Estate                                  | 44,012.55                         | 86,674.97                        | 34,110.77                         | 72,494.95                        |
| Hedge Fund of Funds                          | 0.00                              | 0.00                             | 0.00                              | 0.00                             |
| Real Return Strategy                         | <u>61,749.76</u>                  | <u>95,134.79</u>                 | <u>62,761.68</u>                  | <u>160,695.86</u>                |
| <b>Total Dividends and Interest</b>          | <b><u>\$188,947.44</u></b>        | <b><u>\$534,953.35</u></b>       | <b><u>\$202,052.69</u></b>        | <b><u>\$605,926.94</u></b>       |
| <b>Gain (Loss) in Fair Value:</b>            |                                   |                                  |                                   |                                  |
| Short Term Bond Fund                         | (\$14,362.18)                     | (\$29,268.95)                    | (\$7,130.28)                      | \$60,206.67                      |
| Intermediate Term Bond Funds                 | (108,134.89)                      | (96,501.42)                      | (12,139.73)                       | 251,320.17                       |
| Domestic Common Stock Funds                  | (207,578.53)                      | 124,412.07                       | 205,158.67                        | 439,644.36                       |
| International Equity Fund                    | (216,837.90)                      | 500,393.82                       | 90,845.12                         | 512,176.90                       |
| Real Estate                                  | 120,718.20                        | 244,110.74                       | 65,933.29                         | 124,276.08                       |
| Hedge Fund of Funds                          | 0.00                              | 0.00                             | 0.00                              | 0.00                             |
| Real Return Strategy                         | <u>(298,738.80)</u>               | <u>(173,815.49)</u>              | <u>258,610.90</u>                 | <u>652,346.87</u>                |
| <b>Total Gain (Loss) in Fair Value</b>       | <b><u>(\$724,934.10)</u></b>      | <b><u>\$569,330.77</u></b>       | <b><u>\$601,277.97</u></b>        | <b><u>\$2,039,971.05</u></b>     |
| <b>TOTAL RETURN</b>                          | <b><u>(\$535,986.66)</u></b>      | <b><u>\$1,104,284.12</u></b>     | <b><u>\$803,330.66</u></b>        | <b><u>\$2,645,897.99</u></b>     |
| <b>Portions Allocated to Excess Program:</b> |                                   |                                  |                                   |                                  |
| Dividends and Interest                       | \$8,370.37                        | \$22,593.73                      | \$11,698.85                       | \$50,514.50                      |
| Gain (Loss) in Fair Value                    | <u>(32,114.58)</u>                | <u>17,113.16</u>                 | <u>34,813.99</u>                  | <u>167,145.87</u>                |
| <b>TOTAL ALLOCATED TO EXCESS PROGRAM</b>     | <b><u>(\$23,744.21)</u></b>       | <b><u>\$39,706.89</u></b>        | <b><u>\$46,512.84</u></b>         | <b><u>\$217,660.37</u></b>       |



**Oregon State Bar  
Professional Liability Fund  
Excess Program  
Balance Sheet  
6/30/2015**

**ASSETS**

|                                   | <u>THIS YEAR</u>             | <u>LAST YEAR</u>             |
|-----------------------------------|------------------------------|------------------------------|
| Cash                              | \$306,258.13                 | \$286,056.69                 |
| Assessment Installment Receivable | 452,389.75                   | 483,493.19                   |
| Due from Reinsurers               | 548,664.02                   | 708,820.25                   |
| Investments at Fair Value         | <u>2,205,340.22</u>          | <u>2,656,636.71</u>          |
| <b>TOTAL ASSETS</b>               | <b><u>\$3,512,652.12</u></b> | <b><u>\$4,135,006.84</u></b> |

**LIABILITIES AND FUND EQUITY**

|   | <u>THIS YEAR</u>             | <u>LAST YEAR</u>             |
|---|------------------------------|------------------------------|
| <b>Liabilities:</b>                               |                              |                              |
| Accounts Payable & Refunds Payable                | \$2,967.30                   | \$1,960.20                   |
| Due to Primary Fund                               | \$0.00                       | \$16,579.64                  |
| Due to Reinsurers                                 | 701,180.99                   | 978,150.04                   |
| Ceding Commission Allocated for Remainder of Year | <u>380,951.26</u>            | <u>404,875.63</u>            |
| <b>Total Liabilities</b>                          | <b><u>\$1,085,099.55</u></b> | <b><u>\$1,401,565.51</u></b> |
| <b>Fund Equity:</b>                               |                              |                              |
| Retained Earnings (Deficit) Beginning of Year     | \$2,708,571.47               | \$2,708,571.47               |
| Year to Date Net Income (Loss)                    | <u>(53,259.72)</u>           | <u>24,869.86</u>             |
| <b>Total Fund Equity</b>                          | <b><u>\$2,655,311.75</u></b> | <b><u>\$2,733,441.33</u></b> |
| <b>TOTAL LIABILITIES AND FUND EQUITY</b>          | <b><u>\$3,740,411.30</u></b> | <b><u>\$4,135,006.84</u></b> |

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** MCLE Committee  
**Re:** Accreditation criteria for child and elder abuse reporting programs

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### Issue

Amend the MCLE Rules and Regulations to clarify the accreditation criteria for child and elder abuse reporting programs.

### Background

In order to assist program sponsors when planning programs, and members when attending programs, the Committee recommends amending the Regulations to MCLE Rule 5 to clarify what is required in order to qualify for child abuse or elder abuse reporting credit.

In 2012, the MCLE Committee instructed staff to strictly interpret Rule 3.2(b) regarding child abuse reporting credit. Per the Committee, in order to qualify for child abuse reporting credit, the program must include an Oregon attorney's requirements to report child abuse and the exceptions to those requirements. However, the rules and regulations were not amended to include this information.

After the elder abuse reporting requirement was approved by the Supreme Court, staff notified sponsors of this new requirement and provided the following information:

*In order to qualify for elder abuse reporting credit, the one hour program must include discussion of the reporting requirements for lawyers AND the exceptions to those requirements.*

The Committee believes that Rules 3.2(b) and 5.5(a) support this requirement because they require that 1) the program be on the lawyer's duty to report, and 2) the activity include a discussion of the applicable disciplinary rules which, in this case, is the confidentiality rule and how it interfaces with the exceptions to the duty to report. Nonetheless, staff recently had a program sponsor ask where the information above is set forth, as he did not see it in the MCLE Rules and Regulations, the statute, or the amendments to the statute.

Therefore, in order to clarify the meaning of the Rules, the Committee recommends amending the Regulations to MCLE Rule 5 to include the following:

Regulation 5.700 In order to be accredited as a child abuse reporting or elder abuse reporting activity, the one-hour session must include discussion of an Oregon attorney's requirements to report child abuse or elder abuse and the exceptions to those requirements.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** MCLE Committee  
**Re:** Proposed Rule Four and Regulations to Rule Four Amendments

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### Issue

In an effort to streamline the MCLE Rules and make the application accreditation process easier and more clearly defined, especially in light of the new association management software, the MCLE Committee recommends amending several rules and regulations regarding the accreditation procedure.

### Discussion

First, the Committee recommends eliminating the special category of “accredited sponsors.” There are currently over 6,000 sponsors listed in the MCLE program database. However, only 87 are listed as an accredited sponsor of Oregon CLE activities, including nine that have been added since 2009.

When the MCLE Rules were first approved in the late 1980s, staff believe a distinct differentiation was intended to be made between accredited sponsors and non-accredited sponsors. However, this is not really the case in everyday practice. Although Rule 4.2(a) says accredited sponsors are exempt from the accreditation application requirements, staff cannot update the program database without an application showing title, date, location, etc. of the activity. Therefore, both types must submit accreditation applications. They both must also pay the sponsor fee (same fee applies to both) and report attendance. To the staff’s knowledge, OSB has never had “blanket approval” for any sponsor; all accreditation applications are reviewed. Several well-known national providers of CLE activities, such as the American Law Institute and the American Immigration Lawyers Association, are not accredited sponsors of Oregon CLE activities, and OSB accredits hundreds of these programs each year.

The primary difference is that accredited sponsors have agreed to apply for Oregon CLE accreditation and report attendance for each of its activities an Oregon State Bar member attends. Members attending a program sponsored by a non-accredited sponsor may need to submit the accreditation application themselves if the sponsor does not submit one.

When the MCLE Rules were first implemented and there were only a small number of CLE sponsors, the accredited sponsor status made more sense as OSB members could easily choose to attend programs offered by accredited sponsors and know that the sponsor would handle the paperwork (accreditation application, attendance reporting). Today, however, offering CLE programs is a competitive business. Many non-accredited sponsors handle the

accreditation process the same as accredited sponsors. They could require the OSB member to submit the application, but it is a marketing strategy to advertise that the program has been accredited in certain states. Because members now have so many options when choosing how to spend their CLE dollars, many sponsors know that, accredited sponsor status or not, most members expect the sponsor to handle the paperwork.

Also, Regulation 7.150 requires that sponsors submit an attendance record for their accredited CLE activities so deleting the accredited sponsor status would have no impact on attendance reporting by sponsors.

Because there is no value to retaining the special category of accredited sponsors, the Committee recommends the following rule and regulation amendments be made to clarify that we accredit programs, not sponsors.

Second, the Committee recommends deleting Rule 4.6, which refers to reciprocal accreditation. Many jurisdictions have determined that if a program is approved for Oregon CLE accreditation, that jurisdiction will honor the accreditation. However, Oregon does not automatically recognize accreditation from any jurisdiction. All accreditation applications for CLE activities are reviewed and processed pursuant to our rules, regardless of whether they have been accredited elsewhere. As written, the rule adds nothing to that process.

Finally, the Committee recommends eliminating Regulation 4.300(a), which provides a 30 day window of time for applications to be reviewed and processed or returned for more information. This is an extremely tight deadline during the peak of the compliance cycle when staff is processing compliance reports and accreditation applications. There is a spike in teaching and program accreditation applications received during November and December because many members submit all their accreditation applications at the end of each year. While staff appreciates those members who submit their accreditation applications well before the reporting period ends, they are still required to process those applications within 30 days of receipt. Staff also receives accreditation applications from sponsors for programs that will be held up to six or more months after the applications were received in our office. These, too, must be processed within 30 days.

The Committee recommends deleting any reference to a time frame in which applications must be processed. All applications will continue to be processed in a timely manner. One of the MCLE Program Outcomes for 2015 is to assure prompt and accurate processing of accreditation applications with the measure being a high percentage of accreditation applications that are processed within 30 days of receipt. This will continue to be included in MCLE's Program Outcome/Measure in future years. However, during the peak of the compliance cycle, this change will allow staff to focus on accreditation applications submitted by members whose reporting periods end within a few weeks. These applications should take priority as these members need to know how many credits they are entitled to claim for a CLE activity. It will also allow staff to focus on processing applications from sponsors

for programs held in the last few weeks of the year. These, too, take priority because members are waiting for this information in order to determine if additional credits should be completed before the end of the year. In addition, this change will allow staff to spread out the workflow more evenly throughout the year and eliminate the need to hire temporary help during the peak of the compliance cycle.

## **Rule Four Accreditation Procedure**

### **4.1 In General.**

(a) In order to qualify as an accredited CLE activity, the activity must be given activity accreditation by the MCLE Administrator.

~~(1) CLE activities must be given activity accreditation by the MCLE Administrator, or~~

~~(2) Must be an activity that would qualify as an accredited CLE activity and that is presented or co-presented by an accredited sponsor, or~~

~~(3) Must be accredited pursuant to MCLE Rule 4.6 or pursuant to a reciprocity agreement to which the Oregon State Bar is a party. An accredited CLE activity may take place outside Oregon.~~

(b) The MCLE Administrator shall ~~periodically~~ electronically publish a list of ~~accredited sponsors and~~ accredited programs.

(c) All sponsors shall permit the MCLE Administrator or a member of the MCLE Committee to audit the sponsors' CLE activities without charge for purposes of monitoring compliance with MCLE requirements. Monitoring may include attending CLE activities, conducting surveys of participants and verifying attendance of registrants.

### **4.2 Sponsor Accreditation.**

~~(a) Subject to the provisions of Rule 4.2(c), CLE activities presented by accredited sponsors are automatically accredited. Accredited sponsors are exempt from the activity accreditation application requirements in Rule 4.3(d).~~

~~(b) A sponsor wishing to qualify as an accredited sponsor shall submit an application to the MCLE Administrator containing the information required by these Rules. In determining whether to grant accreditation, the MCLE Administrator shall consider the sponsor's past and present ability and willingness to present CLE activities in compliance with the accreditation standards listed in these Rules.~~

~~(c) Accredited sponsors shall:~~

~~—— (1) Assign the number of credit hours to be allowed for participation in each of their CLE activities, in compliance with these Rules and any Regulations adopted by the BOG.~~

~~2) Pay to the bar the program sponsor fee required by MCLE Regulation 4.350 for each of its CLE activities, which must be paid prior to each CLE activity. An additional program sponsor fee is required prior to any repeat live presentation of a CLE activity.~~

~~(3) Submit reports and information that may be required by these Rules.~~

~~(4) Comply with all of the accreditation standards contained in these Rules.~~

~~(d) The MCLE Administrator may revoke the accredited status of any sponsor that fails to comply with the requirements and accreditation standards of these Rules and any Regulations adopted by the BOG. The MCLE Administrator shall give 28 days' notice of such revocation. Following the expiration of the notice period, that sponsor shall be required to apply for accreditation of each of its CLE activities as provided in Rule 4.3 of these Rules. Review of the MCLE Administrator's revocation shall be pursuant to Rule 8.1 and Regulation 8.100.~~

~~(e) The automatic accreditation given to CLE activities presented or co-presented by accredited sponsors applies only to activities that comply with the accreditation standards contained in these Rules and any Regulations adopted by the BOG.~~

#### **4.3- 2 Group Activity Accreditation.**

(a) CLE activities ~~not presented by accredited sponsors shall~~ will be considered for accreditation on a case-by-case basis and ~~shall~~ must satisfy the accreditation standards listed in these Rules for the particular type of activity for which accreditation is being requested.

(b) A sponsor or individual active member may apply for accreditation of a group CLE activity by filing a written application for accreditation with the MCLE Administrator. The application shall be made on the form required by the MCLE Administrator for the particular type of CLE activity for which accreditation is being requested and shall demonstrate compliance with the accreditation standards contained in these Rules.

(c) A written application for accreditation of a group CLE activity submitted by or on behalf of the sponsor of the CLE activity shall be accompanied by the program sponsor fee required by MCLE Regulation 4.3500. An additional program sponsor fee is required for a repeat live presentation of a group CLE activity.

(d) A written application for accreditation of a group CLE activity must be filed either before or no later than 30 days after the completion of the activity. An application received more than 30 days after the completion of the activity is subject to a late processing fee as provided in Regulation 4.3500.

(e) The MCLE Administrator may revoke the accreditation of an activity at any time if it determines that the accreditation standards were not met for the activity. Notice of revocation shall be sent to the sponsor of the activity.

(f) Accreditation of a group CLE activity obtained by a sponsor or an active member shall apply for all active members participating in the activity.

**4.4 Credit Hours.** Credit hours, ~~whether determined by an accredited sponsor or by the MCLE Administrator,~~ shall be assigned in multiples of one-quarter of an hour. The BOG shall adopt

regulations to assist sponsors in determining the appropriate number of credit hours to be assigned.

#### **4.5 Sponsor Advertising.**

(a) Only sponsors of accredited group CLE activities may include in their advertising the accredited status of the activity and the credit hours assigned.

(b) Specific language and other advertising requirements may be established in regulations adopted by the BOG.

#### **4.6 Reciprocal Accreditation.**

~~(a) Group CLE activities taking place outside of Oregon may be accredited in Oregon provided:~~

~~—— (1) The jurisdiction in which the activity takes place has a MCLE program and MCLE accreditation standards substantially similar to those established by these Rules; and~~

~~—— (2) The activity has been accredited by the body administering the MCLE program in the jurisdiction in which the activity takes place.~~

~~(b) For the purposes of accreditation in Oregon, the MCLE Administrator may assign a number of credits attributable to the activity taking place outside Oregon in an amount different from the original amount attributed to the activity by the jurisdiction in which the activity takes place.~~

### **Regulations to MCLE Rule 4 Accreditation Procedure**

#### **4.200 Sponsor Accreditation.**

~~(a) Any sponsor seeking accreditation as an accredited sponsor under the MCLE Rules shall submit an application to the MCLE Administrator containing the following information:~~

~~—— (i) Specific credentials of the sponsor as to overall qualifications as a provider, continuing legal education experience and the like; and~~

~~—— (ii) Date, time, place and program content of previously sponsored programs and/or proposed continuing legal education programs and their compliance with the accreditation standards in MCLE Rule 5.1.~~

~~(b) The MCLE Administrator shall consider the application for accreditation and shall notify the sponsor seeking accreditation within 21 days of the accreditation determination. Review procedures shall be pursuant to MCLE Rule 8.1 and Regulation 8.100.~~

#### **4.300 4.200 Group Activity Accreditation.**

~~(a) Applications for accreditation shall be deemed approved unless the MCLE Administrator, within 30 days after receipt of the application, sends a notice that the application is questioned or that additional time is required for approval. The applicant shall have 14 days to respond to the MCLE Administrator's questions. The applicant's response to a questioned application shall be reviewed by the MCLE Administrator and the applicant shall be notified of the decision no later than 21 days after submission of the response.~~

~~(b)~~(a) Review procedures shall be pursuant to MCLE Rule 8.1 and Regulation 8.100.

~~(c)~~ (b) The number of credit hours assigned to the activity shall be determined based upon the information provided by the applicant. The applicant shall be notified via email or regular mail of the number of credit hours assigned or if more information is needed in order to process the application.

#### **4.350 4.300 Sponsor Fees.**

(a) A sponsor of a group CLE activity that is accredited for 4 or fewer credit hours shall pay a program sponsor fee of \$40.00. An additional program sponsor fee is required for every repeat live presentation of an accredited activity, but no additional fee is required for a video or audio replay of an accredited activity.

(b) A sponsor of a group CLE activity that is accredited for more than 4 credit hours shall pay a program sponsor fee of \$75. An additional program sponsor fee is required for every repeat live presentation of an accredited activity, but no additional fee is required for a video or audio replay of an accredited activity.

(c) Sponsors presenting a CLE activity as a series of presentations may pay one program fee of \$40.00 for all presentations offered within three consecutive calendar months, provided:

(i) The presentations do not exceed a total of three credit hours for the approved series; and

(ii) Any one presentation does not exceed one credit hour.

(d) A late processing fee of \$40 is due for accreditation applications that are received more than 30 days after the program date. This fee is in addition to the program sponsor fee and accreditation shall not be granted until the fee is received.

(e) All local bar associations in Oregon are exempt from payment of the MCLE program sponsor fees. However, if accreditation applications are received more than 30 days after the program date, the late processing fee set forth in MCLE Regulation 4.350(d) will apply.

#### **4.400 Credit Hours.**

(a) Credit hours shall be assigned to CLE activities in multiples of one-quarter of an hour or .25 credits and are rounded to the nearest one-quarter credit.

(b) Credit Exclusions. Only CLE activities that meet the accreditation standards stated in MCLE Rule 5 shall be included in computing total CLE credits. Credit exclusions include the following:

(1) Registration

(2) Non-substantive introductory remarks

(3) Breaks exceeding 15 minutes per three hours of instruction

(4) Business meetings

(5) Programs of less than 30 minutes in length

#### **4.500 Sponsor Advertising.**

(a) Advertisements by sponsors of accredited CLE activities shall not contain any false or misleading information.



(b) Information is false or misleading if it:

- (i) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (ii) Is intended or is reasonably likely to create an unjustified expectation as to the results to be achieved from participation in the CLE activity;
- (iii) Is intended or is reasonably likely to convey the impression that the sponsor or the CLE activity is endorsed by, or affiliated with, any court or other public body or office or organization when such is not the case.

(c) Advertisements may list the number of approved credit hours. If approval of accreditation is pending, the advertisement shall so state and may list the number of CLE credit hours for which application has been made.

(d) If a sponsor includes in its advertisement the number of credit hours that a member will receive for attending the program, the sponsor must have previously applied for and received MCLE accreditation for the number of hours being advertised.

If the recommendations listed above are approved by the Board of Governors and Supreme Court (if required), the following rules regarding terms and definitions will also need to be amended.

**1.2 Accreditation:** The formal process of accreditation of ~~sponsors or~~ activities by the MCLE Administrator.

~~**1.3 Accredited Sponsor:** A sponsor that has been accredited by the MCLE Administrator.~~

**1.5 Accredited CLE Activity:** An activity that provides legal or professional education to attorneys in accordance with MCLE Rule 5.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** Legal Ethics Committee  
**Re:** Updating OSB Formal Ethics Opinions 2005-4, 2005-70, 2005-101, 2005-108, 2005-109, 2005-120, 2005-153, and 2005-176

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### Issue

The Board of Governors must decide whether to adopt the proposed amendments to the formal ethics opinions.

### Options

1. Adopt the proposed amendments to the formal ethics opinions.
2. Decline to adopt the proposed amendments to the formal ethics opinions.

### Discussion

The Oregon Supreme Court has adopted numerous amendments to the Oregon Rules of Professional Conduct over the last couple of years. The Legal Ethics Committee is in the process of reviewing all of the formal ethics opinions to determine whether and how the opinions need to be amended to bring them into conformance with the new rules. The attached is the fourth batch of opinions that require amendments.

This fourth batch of amended opinions consists of purely housekeeping amendments. The amendments include swapping out the relevant prior rule with the amended rule and providing additional explanation of the new rule to the extent necessary. The committee also made some changes to the organization of the opinions for clarity. The committee made no changes to the original substantive positions taken in any of the attached opinions.

EOP 2005-176 was amended to align the reasoning with the recent Oregon Supreme Court opinion *In re Spencer*

Staff recommends adopting the proposed amended opinions.

Attachments: Redline and Clean versions of OSB Formal Ethics Op Nos. 2005-4, 2005-70, 2005-101, 2005-108, 2005-109, 2005-120, 2005-153, 2005-176

**FORMAL OPINION NO. 2005-4**  
**Conflicts of Interest, Current Clients:**  
**Advancement of Living Expenses, Bail,**  
**and Travel Expenses to Client**

**Facts:**

Lawyer *A* proposes to advance or guarantee Client *A*'s living expenses pending the outcome of litigation that Lawyer *A* is handling for Client *A*.

Lawyer *B* proposes to advance bail money to Client *B*, along with court-related costs, on the express understanding that Client *B* will remain liable to Lawyer therefor.

Lawyer *C* proposes to pay for Lawyer *C*'s own travel and investigation expenses incurred on Client *C*'s behalf from Lawyer *C*'s own funds.

**Questions:**

1. Is the proposed conduct of Lawyer *A* ethical?
2. Is the proposed conduct of Lawyer *B* ethical?
3. Is the proposed conduct of Lawyer *C* ethical?

**Conclusions:**

1. No.
2. Yes, qualified.
3. Yes.

**Discussion:**

All of the foregoing questions are governed by Oregon RPC 1.8(e):

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

This rule must be read in concert with Oregon RPC 1.7(a)(2), which states that a lawyer "shall not" represent a client if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Under Oregon RPC 1.7(a)(2), Lawyer *A*'s proposed conduct is unethical. *See In re Brown*, 298 Or 285, 692 P2d 107 (1984). By advancing these expenses, Lawyer *A* would be acquiring an interest in the litigation.

On the other hand, bail appears to be close enough to court-related costs to constitute “expenses of litigation,” which a lawyer may properly advance as long as the client remains liable therefor. Consequently, Lawyer *B*’s proposed conduct does not per se violate Oregon RPC 1.7(a)(2). Nevertheless, advancing significant bail funds, especially in the absence of a strong personal or familial relationship, could result in a personal conflict of interest between lawyer and client pursuant to Oregon RPC 1.7(a)(2). If so, Lawyer *B* could not advance bail funds without, at a minimum, satisfying himself or herself that the requirements of Oregon RPC 1.7(b) could be met and obtaining the necessary conflicts waiver. *See* ABA Formal Op No 04-432.

Lawyer *C*’s conduct is permissible. Indeed, such an assumption of investigative expenses is commonplace in contingent fee litigation.

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COMMENT: For additional information on this general topic and other related topics, see THE ETHICAL OREGON LAWYER §§3.42–3.44 and chapter 8 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §36 (2003); and ABA Model Rules 1.7(b), 1.8(e).

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Lawyer *C* proposes to pay for Lawyer *C*'s own travel and investigation expenses incurred on Client *C*'s behalf from Lawyer *C*'s own funds.

**Questions:**

1. Is the proposed conduct of Lawyer *A* ethical?
2. Is the proposed conduct of Lawyer *B* ethical?
3. Is the proposed conduct of Lawyer *C* ethical?

**Conclusions:**

1. No.
2. Yes, qualified.
3. Yes.

**Discussion:**

All of the foregoing questions are governed by Oregon RPC 1.8(e):

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. ~~While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.~~

This rule must be read in concert with Oregon RPC 1.7(a)(2), which states that a lawyer “shall not” represent a client if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Under Oregon RPC 1.7(a)(2), Lawyer *A*’s proposed conduct is unethical. *See In re Brown*, 298 Or 285, 692 P2d 107 (1984). By advancing these expenses, Lawyer *A* would be acquiring an interest in the litigation.

On the other hand, bail appears to be close enough to court-related costs to constitute “expenses of litigation,” which a lawyer may properly advance as long as the client remains liable therefor. Consequently, Lawyer *B*’s proposed conduct does not per se violate Oregon RPC 1.7(a)(2). Nevertheless, advancing significant bail funds, especially in the absence of a strong personal or familial relationship, could result in a personal conflict of interest between lawyer and client pursuant to Oregon RPC 1.7(a)(2). If so, Lawyer *B* could not advance bail funds without, at a minimum, satisfying himself or herself that the requirements of Oregon RPC 1.7(b) could be met and obtaining the necessary conflicts waiver. *See* ABA Formal Op No 04-432.

Lawyer *C*’s conduct is permissible. Indeed, such an assumption of investigative expenses is commonplace in contingent fee litigation.

~~Approved by Board of Governors, August 2005.~~

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COMMENT: For additional information on this general topic and other related topics, see THE ETHICAL OREGON LAWYER §§3.42–3.44 and chapter 8 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §36 (2003); and ABA Model Rules 1.7(b), 1.8(e).

## FORMAL OPINION NO. 2005-70

### Lawyer Changing Firms: Duty of Loyalty

#### Facts:

Lawyer is an associate or partner at Firm *A*. Lawyer is considering leaving Firm *A* and going to Firm *B*.

#### Questions:

1. Before Lawyer notifies Firm *A*, may Lawyer inform clients for whom Lawyer does work at Firm *A* of Lawyer's intention to go to Firm *B*?
2. If Lawyer leaves Firm *A* and joins Firm *B*, may Lawyer take the files of clients for whom Lawyer has done or is doing work?
3. After Lawyer leaves, may Lawyer personally contact clients for whom Lawyer did work while at Firm *A* to solicit their business for Firm *B*?

#### Conclusions:

1. See discussion.
2. Yes, qualified.
3. Yes, qualified.

#### Discussion:

1. *Contact with Clients While Still at Firm A.*

The primary duty of all lawyers is the fiduciary duty that lawyers owe to their clients. *Cf.* OSB Formal Ethics Op No 2005-26. Depending on the nature and status of Lawyer's work, this duty may well mean that advance notification is necessary to permit the clients to decide whether they wish to stay with Firm *A*, to go with Lawyer to Firm *B*, or to pursue some other alternative. However, Lawyer's fiduciary duty to Firm *A* may require Lawyer to give notice to Firm *A* of Lawyer's intent to change firms prior to contacting clients of Firm *A*. *See* Penn Ethics Op 2007-300 (noting a departing lawyer may have a duty to notify old firm prior to substantive discussion about association with another firm). As this duty depends on specific facts, we cannot say whether the duty of advance notice exists here.<sup>1</sup>

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<sup>1</sup> For example, while Lawyer would generally notify Firm *A* before contacting clients, Lawyer might not notify Firm *A* if Lawyer believes Firm *A* will engage in obstructive conduct preventing Lawyer from contacting clients or transitioning to Firm *B*. If Lawyer is able to notify Firm *A* in advance, Lawyer and Firm *A* may send a joint notice to clients to permit clients to decide how to continue their representation. Some states require joint notification to clients from both old firm and departing lawyer. *See* Virginia Rule 5.8; Florida Rule 4-5.8. We do not express an opinion about whether joint notification is required in Oregon.

Lawyer owes duties to Firm *A*, Lawyer's current firm, arising out of the contractual, fiduciary, or agency relationship between Lawyer and Firm *A*. This contractual, fiduciary, or agency duty may be violated if, while still being compensated by Firm *A*, Lawyer endeavors to take clients away from Firm *A*. Cf. OSB Formal Ethics Op No 2005-60; ABA Formal Ethics Op No 99-414 (1999); *Joseph D. Shein, P.C. v. Myers*, 576 A2d 985 (Pa 1990); *Adler, Barish, Daniels, Levin v. Epstein*, 393 A2d 1175, 1182–1186 (Pa 1978).<sup>2</sup> If Lawyer's conduct would, under the circumstances, amount to "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law" in violation of Oregon RPC 8.4(a)(3), Lawyer would be subject to discipline. Absent specific facts, we cannot say whether that would be the case here.

Regardless of the contractual, fiduciary, or agency relationship between Lawyer and Firm *A*, however, it is clear under Oregon RPC 8.4(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm *A*. See *In re Smith*, 315 Or 260, 843 P2d 449 (1992); *In re Murdock*, 328 Or 18, 968 P2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is duty of candor toward that law firm). Cf. *In re Hiller*, 298 Or 526, 694 P2d 540 (1985); *In re Houchin*, 290 Or 433, 622 P2d 723 (1981).

## 2. *Control over Client Files and Property.*

Oregon RPC 1.15-1(a), (d), and (e) provide, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

....

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or

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<sup>2</sup> Lawyer and Firm *A* should be aware of their ethical obligations under Oregon RPC 5.6 (prohibiting restrictions on right to practice) and 1.16(d) (lawyer shall take reasonably practicable steps to protect client upon terminating representation). For example, Lawyer and Firm *A* should not engage in behavior that prejudices client during transfer from Firm *A* to Firm *B*.



third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Pursuant to these sections, and assuming that Firm *A* does not have a valid and enforceable lien on any client property for unpaid fees, Firm *A* must promptly surrender client property to Lawyer, if the clients so request. *Cf.* OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125.<sup>3</sup>

With respect to any portion of the file that does not constitute client property, it is necessary to consider Oregon RPC 1.16(d):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

As a practical matter, and assuming again that Firm *A* does not have a valid and enforceable lien, the only way to “protect a client's interests” would be to turn over all parts of the file that a client might reasonably need. See OSB Formal Ethics Op No 2005-125, regarding payment for photocopy costs and the identification of certain documents that may need to be provided to a client who requests them.

### 3. *Solicitation of Former Clients.*

The Rules of Professional Responsibility generally not prohibit Lawyer from soliciting the clients of other lawyers.<sup>4</sup> Although in-person or telephone solicitation is generally prohibited by Oregon RPC 7.3(a),<sup>5</sup> Oregon RPC 7.3(a)(2) contains an exception for former clients, subject

<sup>3</sup> As noted in OSB Formal Ethics Op No 2005-60, Firm *A* may not insist that clients physically pick up their files in person if Firm *A* receives written directions from the clients to send the files elsewhere. In the period of time before receiving a client's decision about who will handle a matter, neither Firm *A* nor Lawyer should deny each other access to information about a client or a matter that is necessary to protect a client's interests. *Cf.* Oregon RPC 1.1 (lawyer shall provide competent representation to client; competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation); Oregon RPC 1.3 (lawyer shall not neglect legal matter entrusted to lawyer).

<sup>4</sup> Lawyer may have fiduciary obligations to Firm *A* that may affect Lawyer's ability to solicit clients at certain times. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9 (2003).

<sup>5</sup> Oregon RPC 7.3(a) provides:

to the limitations in Oregon RPC 7.3(b)(3).<sup>6</sup> Clients for whom Lawyer worked while at Firm *A* are Lawyer's former clients. Lawyer also may solicit the former clients in writing if the requirements of Oregon RPC 7.1<sup>7</sup> and 7.3 are met.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2, 7.6, 7.39, 11.14–11.15, 12.22, 12.28–12.30 (Oregon CLE 20032006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 9(3), 16, 33, 43–46 (2003); and ABA Model Rules 1.1, 1.3, 1.15–1.16(d), 7.3(a)–(b), 8.4(c). See also Washington Informal Ethics Advisory Op No 1702 (unpublished).

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(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

<sup>6</sup> Oregon RPC 7.3(b) provides:

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if

- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (3) the solicitation involves coercion, duress or harassment.

<sup>7</sup> Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

## FORMAL OPINION NO. 2005-70

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#### Questions:

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#### Conclusions:

1. See discussion.
2. Yes, qualified.
3. Yes, qualified.

#### Discussion:

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(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall

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promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Pursuant to these sections, and assuming that Firm *A* does not have a valid and enforceable lien on any client property for unpaid fees, Firm *A* must promptly surrender client property to Lawyer, if the clients so request. *Cf.* ~~OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125~~. OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125.<sup>3</sup>

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(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

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3. *Solicitation of Former Clients.*

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<sup>5</sup> Oregon RPC 7.3~~(b)~~(ba) provides:

~~(b)~~ A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- ~~(2)~~ (2) has a family, close personal, or prior professional relationship with the lawyer.

<sup>6</sup> Oregon RPC 7.3(b) provides:

~~(b)~~ A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if

- ~~(1)~~ (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;
- ~~(2)~~ (2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- ~~(3)~~ (3) the solicitation involves coercion, duress or harassment.

<sup>7</sup> Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2, 7.6, 7.39, 11.14–11.15, 12.22, 12.28–12.30 (Oregon CLE 20032006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 9(3), 16, 33, 43–46 (2003); and ABA Model Rules 1.1, 1.3, 1.15–1.16(d), 7.3(a)–(b), 8.4(c). See also Washington Informal Ethics Advisory Op No 1702 (unpublished).

~~Approved by Board of Governors, August 2005.~~

**FORMAL OPINION NO. 2005-101**

**Unauthorized Practice of Law:  
Lawyer as Mediator, Trade Names,  
Division of Fees with Nonlawyer**

**Facts:**

Lawyer and Psychologist would like to form a domestic relations mediation service under the assumed business name of “Family Mediation Center.”

**Questions:**

1. May Lawyer act as mediator?
2. May Lawyer join with Psychologist to establish a mediation practice?
3. May they use the trade name “Family Mediation Center”?
4. What limitations, if any, exist on the potential allocation of work between Lawyer and Psychologist and on the allocation of fees or profits relating thereto?

**Conclusions:**

1. Yes.
2. Yes, qualified.
3. Yes, qualified.
4. See discussion.

**Discussion:**

1. *Lawyers as Mediators.*

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - (2) must clearly inform the parties of and obtain the parties’ consent to the lawyer’s role as mediator.
- (b) A lawyer serving as mediator:
  - (1) may prepare documents that memorialize and implement the agreement reached in mediation;
  - (2) shall recommend that each party seek independent legal advice before executing the documents; and
  - (3) with the consent of all parties, may record or may file the documents in court.
- (c) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.



Pursuant to Oregon RPC 2.4, an Oregon lawyer who acts as mediator does not represent any of the parties to the mediation. This is why, among other things, the multiple-client conflict-of-interest rules set forth in Oregon RPC 1.7 do not apply. *Cf.* OSB Formal Ethics Op Nos 2005-94, 2005-46.

As long as Lawyer's conduct is consistent with Oregon RPC 2.4, Lawyer may act as mediator. For example, Lawyer could not, in light of Oregon RPC 2.4(b), draft a settlement agreement on behalf of divorcing spouses and then endeavor to file the parties' settlement agreement of record with the court without first obtaining the consent of the parties.

## 2. *Joining with a Nonlawyer to Provide Mediation Services.*

Oregon RPC 5.4 provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that;

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from the referral.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Nonlawyers can and do lawfully act as mediators. In addition, lawyers are at liberty to engage in businesses other than the practice of law. *Cf.* OSB Formal Ethics Op No 2005-10. If the mediation service to be formed by Lawyer and Psychologist does not involve the practice of law, there is no reason Lawyer and Psychologist cannot join together to provide mediation services. Moreover, if the practice of law is not involved, the Oregon RPCs do not govern the nature of the business entity created by Lawyer and Psychologist (e.g., as a partnership, as a jointly owned corporation, or in an employer-employee relationship).

The practice of law involves, among other things, the application of a general body of legal knowledge to the problems of a specific entity or person. Drafting settlement agreements for others constitutes the practice of law. *Cf. In re Jones*, 308 Or 306, 779 P2d 1016 (1989); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 377 P2d 334 (1962). See also OSB Formal Ethics Op Nos 2005-87 and 2005-20, and sources cited; *Kolker v. Duke City Collection Agency*, 750 F Supp 468 (DNM 1990).

If it is anticipated that the mediation service would involve the practice of law, such as by drafting settlement agreements, then Oregon RPC 5.4(b) and (d) prohibit Lawyer and Psychologist from forming a partnership, or professional corporation, or other association in which Psychologist owns an interest. Oregon RPC 5.5(a) is also relevant:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

*See also In re Jones, supra.* The net result of these provisions is that Lawyer may not aid or assist Psychologist in doing acts that would constitute the practice of law; that Lawyer and Psychologist may not form a partnership that includes the practice of law; that Lawyer may not work as Psychologist's agent or employee in providing legal services to others, and that Lawyer and Psychologist may not jointly own a corporation whose business consists in whole or in part of the practice of law.

### 3. *Use of a Trade Name.*

If the mediation service would not involve the practice of law, there would be no particular ethical limitation on the use of a trade name other than the general obligation to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3).

If the business of the mediation service includes the practice of law, attention must also be given to Oregon RPC 7.5(a).<sup>1</sup> The name “Family Mediation Center” appears to be permissible as a trade name that is not misleading. *Cf. In re Shannon/Johnson*, 292 Or 339, 638 P2d 482 (1982).

4. *Allocation of Profits or Fees.*

If the mediation service would not involve the practice of law, there is no ethical restriction on the allocation of profits or fees.

If the mediation service would involve the practice of law, Lawyer would be prohibited from sharing fees with Psychologist pursuant to Oregon RPC 5.4(a) but could hire Psychologist on a salary basis.<sup>2</sup> *Cf. OSB Formal Ethics Op Nos 2005-25, 2005-10.*

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<sup>1</sup> Oregon RPC 7.5(a) provides:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

As a general proposition, Oregon RPC 7.1 prohibits a lawyer from making any false or misleading communications about the lawyer or the lawyer’s services.

<sup>2</sup> Whether there are any ethical or legal limitations with respect to Psychologist’s practice that would prevent Lawyer from owning a part of Psychologist’s practice is a question that we have not been asked to consider and therefore do not consider. *Cf. OSB Formal Ethics Op No 2005-10.*

COMMENT: For additional information on this general topic or other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.18–2.20, 12.3, 12.9–12.11, 12.15, 12.25 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 3–4, 9–10 (2003); and ABA Model Rules 2.4, 5.4–5.5, 7.5, 8.4(c).

**FORMAL OPINION NO. 2005-101**

**Unauthorized Practice of Law:  
Lawyer as Mediator, Trade Names,  
Division of Fees with Nonlawyer**

**Facts:**

Lawyer and Psychologist would like to form a domestic relations mediation service under the assumed business name of "Family Mediation Center."

**Questions:**

1. May Lawyer act as mediator?
2. May Lawyer join with Psychologist to establish a mediation practice?
3. May they use the trade name "Family Mediation Center"?
4. What limitations, if any, exist on the potential allocation of work between Lawyer and Psychologist and on the allocation of fees or profits relating thereto?

**Conclusions:**

1. Yes.
2. Yes, qualified.
3. Yes, qualified.
4. See discussion.

**Discussion:**

1. *Lawyers as Mediators.*

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - \_\_\_\_\_ (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - \_\_\_\_\_ (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (b) A lawyer serving as mediator:
  - \_\_\_\_\_ (1) may prepare documents that memorialize and implement the agreement reached in mediation;
  - \_\_\_\_\_ (2) shall recommend that each party seek independent legal advice before executing the documents; and
  - \_\_\_\_\_ (3) with the consent of all parties, may record or may file the documents in court.
- ~~(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the~~

~~representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.~~

\_\_\_\_\_(d) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Pursuant to Oregon RPC 2.4, an Oregon lawyer who acts as mediator does not represent any of the parties to the mediation. This is why, among other things, the multiple-client conflict-of-interest rules set forth in Oregon RPC 1.7 do not apply. *Cf.* OSB Formal Ethics Op Nos 2005-94, 2005-46.

As long as Lawyer's conduct is consistent with Oregon RPC 2.4, Lawyer may act as mediator. For example, Lawyer could not, in light of Oregon RPC 2.4(b), draft a settlement agreement on behalf of divorcing spouses and then endeavor to file the parties' settlement agreement of record with the court without first obtaining the consent of the parties.

## 2. *Joining with a Nonlawyer to Provide Mediation Services.*

Oregon RPC 5.4 provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that;

\_\_\_\_\_(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

\_\_\_\_\_(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

\_\_\_\_\_(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

\_\_\_\_\_(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from the referral.-

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

\_\_\_\_\_(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

\_\_\_\_\_ (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

\_\_\_\_\_ (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Nonlawyers can and do lawfully act as mediators. In addition, lawyers are at liberty to engage in businesses other than the practice of law. *Cf.* OSB Formal Ethics Op No 2005-10. If the mediation service to be formed by Lawyer and Psychologist does not involve the practice of law, there is no reason Lawyer and Psychologist cannot join together to provide mediation services. Moreover, if the practice of law is not involved, the Oregon RPCs do not govern the nature of the business entity created by Lawyer and Psychologist (e.g., as a partnership, as a jointly owned corporation, or in an employer-employee relationship).

The practice of law involves, among other things, the application of a general body of legal knowledge to the problems of a specific entity or person. Drafting settlement agreements for others constitutes the practice of law. *Cf. In re Jones*, 308 Or 306, 779 P2d 1016 (1989); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 377 P2d 334 (1962). See also OSB Formal Ethics Op Nos 2005-87 and 2005-20, and sources cited; *Kolker v. Duke City Collection Agency*, 750 F Supp 468 (DNM 1990).

If it is anticipated that the mediation service would involve the practice of law, such as by drafting settlement agreements, then Oregon RPC 5.4(b) and (d) prohibit Lawyer and Psychologist from forming a partnership, or professional corporation, or other association in which Psychologist owns an interest. Oregon RPC 5.5(a) is also relevant:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

*See also In re Jones, supra.* The net result of these provisions is that Lawyer may not aid or assist Psychologist in doing acts that would constitute the practice of law; that Lawyer and Psychologist may not form a partnership that includes the practice of law; that Lawyer may not work as Psychologist's agent or employee in providing legal services to others, and that Lawyer and Psychologist may not jointly own a corporation whose business consists in whole or in part of the practice of law.

### 3. *Use of a Trade Name.*

If the mediation service would not involve the practice of law, there would be no particular ethical limitation on the use of a trade name other than the general obligation to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3).

If the business of the mediation service includes the practice of law, attention must also be given to Oregon RPC 7.5(ea).<sup>1</sup> The name “Family Mediation Center” appears to be permissible as a trade name that is not misleading. *Cf. In re Shannon/Johnson*, 292 Or 339, 638 P2d 482 (1982).

4. *Allocation of Profits or Fees.*

If the mediation service would not involve the practice of law, there is no ethical restriction on the allocation of profits or fees.

If the mediation service would involve the practice of law, Lawyer would be prohibited from sharing fees with Psychologist pursuant to Oregon RPC 5.4(a) but could hire Psychologist on a salary basis.<sup>2</sup> *Cf. OSB Formal Ethics Op Nos 2005-25, 2005-10.*

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<sup>1</sup> Oregon RPC 7.5(ea) provides:

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.(c) — A lawyer in private practice:~~

~~(1) shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm;~~

~~— (2) — may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1; and~~

~~— (3) — may use in a firm name the name or names of one or more of the retiring, deceased or retired members of the firm or a predecessor law firm in a continuing line of succession. The letterhead of a lawyer or law firm may give the names and dates of predecessor firms in a continuing line of succession and may designate the firm or a lawyer practicing in the firm as a professional corporation.~~

As a general proposition, Oregon RPC 7.1 prohibits a lawyer from making any false or misrepresentations or misleading statements, impressions, or expectations in communications about the lawyer or the lawyer’s services.

<sup>2</sup> Whether there are any ethical or legal limitations with respect to Psychologist’s practice that would prevent Lawyer from owning a part of Psychologist’s practice is a question that we have not been asked to consider and therefore do not consider. *Cf. OSB Formal Ethics Op No 2005-10.*

COMMENT: For additional information on this general topic or other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.18–2.20, 12.3, 12.9–12.11, 12.15, 12.25 (Oregon CLE 2003~~6~~); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 3–4, 9–10 (2003); and ABA Model Rules 2.4, 5.4–5.5, 7.5, 8.4(c).

~~Approved by Board of Governors, August 2005.~~



**FORMAL OPINION NO. 2005-108**  
**Information About Legal Services:**  
**Dual Professions, Yellow Pages Advertising**

**Facts:**

Lawyer has an active family mediation practice. In addition to advertising this practice under the “Attorneys” section of the Yellow Pages, Lawyer desires to advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages.

**Question:**

May Lawyer advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages?

**Conclusion:**

Yes, qualified.

**Discussion:**

Oregon RPC 7.1 provides, in pertinent part:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Oregon RPC 7.5(a) provides:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

*See also* OSB Formal Ethics Op No 2005-101 (mediation services generally).

If Lawyer intends to maintain an independent business as a counselor, separate and apart from Lawyer’s legal business, Lawyer may do so. OSB Formal Ethics Op No 2005-10. Lawyer’s advertising and conduct of that separate business cannot, however, include “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.” Oregon RPC 8.4(a)(3); *see In re Houchin*, 290 Or 433, 622 P2d 723 (1981); *In re Staar*, 324 Or 283, 924 P2d 308 (1996) (fact that lawyer was not acting as lawyer at time of false swearing in petition for family abuse prevention restraining order did not diminish lawyer’s culpability).

If Lawyer intends to advertise *as a lawyer* in the Counselor section of the Yellow Pages, Lawyer may do so if the advertisement is not false or misleading or otherwise in violation of

Oregon RPC 8.4(a)(3), 7.1, and 7.5. A person reading an advertisement in the Counselor section of the Yellow Pages would normally be seeking counseling services, not legal services, and would otherwise tend to believe that an advertiser has special qualifications in, and is offering services in, counseling. Accordingly, the advertisement must reflect Lawyer's status as a lawyer offering services as a family mediator.

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COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.6–2.7, 2.20 (Oregon CLE 2006); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op Nos 1488, 1528.

**FORMAL OPINION NO. 2005-108**  
**Information About Legal Services:**  
**Dual Professions, Yellow Pages Advertising**

**Facts:**

Lawyer has an active family mediation practice. In addition to advertising this practice under the “Attorneys” section of the Yellow Pages, Lawyer desires to advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages.

**Question:**

May Lawyer advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages?

**Conclusion:**

Yes, qualified.

**Discussion:**

Oregon RPC 7.1(a) provides, in pertinent part:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

~~A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer’s firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~\_\_\_\_\_ (1) \_\_\_\_\_ contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~\_\_\_\_\_ (2) \_\_\_\_\_ is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer’s firm can achieve;~~

~~\_\_\_\_\_~~

~~\_\_\_\_\_ (4) \_\_\_\_\_ states or implies that the lawyer or the lawyer’s firm specializes in, concentrates a practice in, limits a practice to, is experienced in, is presently handling or is qualified to handle matters or areas of law if the statement or implication is false or misleading;~~

~~\_\_\_\_\_~~

~~\_\_\_\_\_ (11) \_\_\_\_\_ is false or misleading in any manner not otherwise described above; or~~

~~\_\_\_\_\_ (12) \_\_\_\_\_ violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~

Oregon RPC 7.5(a) and (c) provides:

~~(a) — (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice~~

~~if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.~~

~~(c) — A lawyer in private practice:~~

~~(2) — may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. . . .~~

*See also* OSB Formal Ethics Op No 2005-101 (mediation services generally).

If Lawyer intends to maintain an independent business as a counselor, separate and apart from Lawyer's legal business, Lawyer may do so. OSB Formal Ethics Op No 2005-10. Lawyer's advertising and conduct of that separate business cannot, however, include "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3); *see In re Houchin*, 290 Or 433, 622 P2d 723 (1981); *In re Staar*, 324 Or 283, 924 P2d 308 (1996) (fact that lawyer was not acting as lawyer at time of false swearing in petition for family abuse prevention restraining order did not diminish lawyer's culpability).

If Lawyer intends to advertise *as a lawyer* in the Counselor section of the Yellow Pages, Lawyer may do so if the advertisement is not false or misleading or otherwise in violation of Oregon RPC 8.4(a)(3), 7.1, and 7.5. A person reading an advertisement in the Counselor section of the Yellow Pages would normally be seeking counseling services, not legal services, and would otherwise tend to believe that an advertiser has special qualifications in, and is offering services in, counseling. Accordingly, the advertisement must reflect Lawyer's status as a lawyer offering services as a family mediator.

~~Approved by Board of Governors, August 2005.~~

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COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.6–2.7, 2.20 (Oregon CLE 2003~~6~~); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op Nos 1488, 1528 (~~unpublished~~).

**FORMAL OPINION NO. 2005-109**  
**Letterhead Listing an Out-of-State Law Firm**  
**as “Associated Office”**

**Facts:**

Oregon Law Firm contracts with Washington Law Firm to represent Washington Law Firm’s clients in state and federal litigation in Oregon when permissible. Oregon Law Firm would like to print stationery with its name and address at the top, and with the following at the bottom:

“ASSOCIATED OFFICE: Washington Law Firm, [address and telephone number]”

Similarly, Washington Law Firm would like to put Oregon Law Firm’s name, address, and telephone number at the bottom of its stationery as “Associated Office.”

**Questions:**

1. May Oregon Law Firm use stationery with Washington Law Firm listed as “Associated Office”?
2. May Oregon Law Firm permit Washington Law Firm to list it as “Associated Office”?

**Conclusions:**

1. Yes.
2. Yes.

**Discussion:**

Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Oregon RPC 7.5(a) and (b) provide:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

ABA Formal Ethics Op No 84-351 (1984) provides further guidance:

The basic requirement regarding lawyer advertising . . . is that communications by a lawyer concerning legal services must not be false or misleading. [Citation omitted.] Thus, designation by a lawyer or law firm of another law firm on a letterhead or in any other communication, including any private communication with a client or other person, as “affiliated” or “associated” with the lawyer or law firm must be consistent with the actual relationship. Communication that another law firm is “affiliated” or “associated” is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or is used only with other information necessary adequately to describe the relationship and avoid confusion. An “affiliated” or “associated” law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship. [Footnote omitted.]

. . . .

The type of relationship that is implied by designating another firm as “affiliated” or “associated” is analogous to the ongoing relationship that is required . . . when using the designation “Of Counsel.” . . . The relationship must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business. The “affiliated” or “associated” firm must be available to the other firm and its clients for consultation and advice.

In this case, the “Associated Office” designation is not false or misleading and therefore complies with Oregon RPC 7.1 and 7.5.<sup>1</sup>

Because the comparable Washington rules, *see* Washington RPC 7.5, are to the same effect as the Oregon rules, we need not consider the problems that would be raised if Oregon Law Firm were engaged in a practice that caused Washington Law Firm to violate the Washington ethics rules.

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<sup>1</sup> If, however, the letterhead were to list the individual lawyers “associated” in addition to or in lieu of the firm names, the jurisdiction in which each lawyer is licensed to practice would have to be shown in order for the letterhead not to be misleading. *Cf.* Oregon RPC 7.5(b); RPC 8.4(a)(3) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law”).

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.19–2.22 (Oregon CLE 2006); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op No 1015.

**FORMAL OPINION NO. 2005-109**  
**Letterhead Listing an Out-of-State Law Firm**  
**as “Associated Office”**

**Facts:**

Oregon Law Firm contracts with Washington Law Firm to represent Washington Law Firm’s clients in state and federal litigation in Oregon when permissible. Oregon Law Firm would like to print stationery with its name and address at the top, and with the following at the bottom:

“ASSOCIATED OFFICE: Washington Law Firm, [address and telephone number]”

Similarly, Washington Law Firm would like to put Oregon Law Firm’s name, address, and telephone number at the bottom of its stationery as “Associated Office.”

**Questions:**

1. May Oregon Law Firm use stationery with Washington Law Firm listed as “Associated Office”?
2. May Oregon Law Firm permit Washington Law Firm to list it as “Associated Office”?

**Conclusions:**

1. Yes.
2. Yes.

**Discussion:**

Oregon RPC 7.1 ~~(a)~~ provides, in pertinent part:

~~\_\_\_\_\_—A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.~~

~~(a) —A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer’s firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~\_\_\_\_\_ (1) —contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~\_\_\_\_\_ (2) —is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer’s firm can achieve;~~

~~\_\_\_\_\_~~

~~\_\_\_\_\_ (7) \_\_\_\_\_ states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer's firm if they are not;~~

~~\_\_\_\_\_ . . . .~~

~~\_\_\_\_\_ (11) \_\_\_\_\_ is false or misleading in any manner not otherwise described above; or~~

~~\_\_\_\_\_ (12) \_\_\_\_\_ violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~

~~\_\_\_\_\_ Oregon RPC 7.5(a) and (b) provide:~~

~~\_\_\_\_\_ (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~\_\_\_\_\_ (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~\_\_\_\_\_ (a) \_\_\_\_\_ A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.~~

~~\_\_\_\_\_ (b) \_\_\_\_\_ A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationary of a client if the lawyer or the lawyer's firm devotes a substantial amount of professional time in the representation of the client.~~

ABA Formal Ethics Op No 84-351 (1984) provides further guidance:

The basic requirement regarding lawyer advertising . . . is that communications by a lawyer concerning legal services must not be false or misleading. [Citation omitted.] Thus, designation by a lawyer or law firm of another law firm on a letterhead or in any other communication, including any private communication with a client or other person, as "affiliated" or "associated" with the lawyer or law firm must be consistent with the actual relationship. Communication that another law firm is "affiliated" or "associated" is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or is used only with other information necessary adequately to describe the relationship and avoid confusion. An "affiliated" or "associated" law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship. [Footnote omitted.]

. . . .

The type of relationship that is implied by designating another firm as "affiliated" or "associated" is analogous to the ongoing relationship that is required . . . when using the designation "Of Counsel." . . . The relationship must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business. The



“affiliated” or “associated” firm must be available to the other firm and its clients for consultation and advice.

In this case, the “Associated Office” designation is not false or misleading and therefore complies with Oregon RPC 7.1 and 7.5.<sup>1</sup>

Because the comparable Washington rules, *see* Washington RPC 7.1 ~~et seq.~~ 5, are to the same effect as the Oregon rules, we need not consider the problems that would be raised if Oregon Law Firm were engaged in a practice that caused Washington Law Firm to violate the Washington ethics rules.

~~Approved by Board of Governors, August 2005.~~

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<sup>1</sup> If, however, the letterhead were to list the individual lawyers “associated” in addition to or in lieu of the firm names, the jurisdiction in which each lawyer is licensed to practice would have to be shown in order for the letterhead not to be misleading. *Cf.* Oregon RPC 7.5(b); RPC 8.4(a)(3) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law”); ~~Oregon RPC 7.5(f) (requiring that jurisdictional limitations be shown when multistate law firm letterheads list individual lawyers).~~

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.189–2.22 (Oregon CLE 20036); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op No 1015 ~~(unpublished)~~.

**FORMAL OPINION NO. 2005-120**  
[REVISED 2015]  
**Conflicts of Interest, Former Clients:  
Lawyer Changing Firms, Former Prosecutor or Judge,  
Disqualification, Screening**

**Facts:**

The *ABC* law partnership does criminal defense work. Lawyer *A* proposes to leave the partnership and go to work as a deputy district attorney for the state.

Deputy District Attorney *D* proposes to leave the district attorney's office and join with Lawyer *E* and Lawyer *F* to form the *DEF* law partnership. The *DEF* law partnership proposes to represent criminal defendants in criminal cases that would be brought by the district attorney's office.

Circuit Court Judge *G* proposes to leave the bench and join with Lawyer *H* and Lawyer *I* to form the *GHI* law partnership. The *GHI* law partnership proposes to represent or oppose clients who had matters pending before Lawyer *G* while Lawyer *G* was a judge.

**Questions:**

1. To what extent may Lawyer *A* or other lawyers in the district attorney's office prosecute clients of the *ABC* law partnership?
2. To what extent may Lawyer *D* or other lawyers in the *DEF* law partnership represent criminal defendants in criminal matters?
3. To what extent may Lawyer *G* or other lawyers in the *GHI* law partnership represent or oppose parties who had matters pending before Lawyer *G* when Lawyer *G* was on the bench?

**Conclusions:**

1. With respect to Lawyer *A*, who is leaving private criminal defense practice to become a deputy district attorney, a three-part answer is appropriate:
  - a. Lawyer *A* cannot prosecute a person who was formerly represented by Lawyer *A* in the same or a substantially related matter, unless the former client and the state give informed consent, confirmed in writing.
  - b. Lawyer *A* cannot prosecute a former client of the *ABC* firm about whom Lawyer *A* obtained confidential information that is material to the matter without the informed consent of the *ABC* firm's former client and the state, confirmed in writing.

- c. Lawyer A's disqualification is not imputed to the other lawyers in the district attorney's office under Oregon RPC 1.11(d).
2. With respect to Lawyer D, who is leaving the district attorney's office for private criminal defense practice, a similar three-part answer is appropriate:
  - a. Lawyer D cannot defend clients in matters that are the same or substantially related to matters that Lawyer D handled at the district attorney's office, unless the client and the state give informed consent, confirmed in writing.
  - b. Lawyer D cannot defend a client on a matter that was prosecuted by other deputy district attorneys during Lawyer D's tenure in the office if Lawyer D obtained confidential information that is material to the matter, except with the informed consent of the client and the state, confirmed in writing.
  - c. Lawyer D's disqualification will be imputed to the other lawyers in the DEF firm, unless Lawyer D is screened from participating in the matter pursuant to Oregon RPC 1.10(c).
3. With respect to Lawyer G, who is leaving the bench for private practice, a three-part answer also is appropriate:
  - a. If Lawyer G did not participate personally and substantially as a judge in a matter in which Lawyer G or the GHI firm proposes to represent a party, neither Lawyer G nor other lawyers in the GHI firm would be prohibited from handling the matter.
  - b. If Lawyer G participated personally or substantially in a matter as a judge, Lawyer G cannot work on that matter in private practice without the informed consent of all parties, confirmed in writing.
  - c. Lawyer G's disqualification will be imputed to the other lawyers in the GHI firm, unless Lawyer G is screened from participating in the matter pursuant to Oregon RPC 1.10(c).

**Discussion:**

- I. *Question No. 1 (Private Practice to Government Service).*
  - A. *Introduction*

When Lawyer *A* leaves the *ABC* firm, Lawyer *A* will have a “former client” relationship with the firm’s clients for purposes of Oregon RPC 1.9.<sup>1</sup> See *In re Brandsness*, 299 Or 420, 427–428, 702 P2d 1098 (1985). Pursuant to Oregon RPC 1.9(a), a lawyer is prohibited from acting adversely to a former client if the current and former matters are the same or substantially related. Matters are “substantially related” if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in the prior representation would materially advance the current client’s position in the new matter. Oregon RPC 1.9(d); ABA Model Rule 1.9 comment [3]. A lawyer also will have a conflict with a client of the lawyer’s former law firm, even if the lawyer did no work on the client’s matters at the former firm, if the lawyer acquired confidential information material to the current client’s matter. Oregon RPC 1.9(b); OSB Formal Ethics Op Nos 2005-11, 2005-17.

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<sup>1</sup> Oregon RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are “substantially related” if (1) the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s position in the subsequent matter.

If a conflict exists under either Oregon RPC 1.9(a) or (b), the lawyer may proceed with the representation if all affected clients give their informed consent, confirmed in writing.<sup>2</sup> The duties owed to former clients under ORS 9.460(3) and Oregon RPC 1.6<sup>3</sup> are coextensive with the duties under Oregon RPC 1.9. OSB Formal Ethics Op No 2005-17.

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<sup>2</sup> Oregon RPC 1.0(b) and (g) provide:

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

<sup>3</sup> Oregon RPC 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; . . .[.]

ORS 9.460(3) requires a lawyer to “[m]aintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.”

It follows that, unless a particular prosecution would result in Lawyer *A*'s being adverse to one of Lawyer *A*'s former clients in a matter that is the same or substantially related to Lawyer *A*'s prior representation of the client, or unless Lawyer *A* acquired confidential information about a client represented by another member of Lawyer *A*'s former firm, neither Lawyer *A* nor any other lawyer in the district attorney's office would be disqualified from handling the matter. Even if such a conflict existed, on obtaining informed consent, confirmed in writing, Lawyer *A* and the other lawyers in the office could proceed.<sup>4</sup> Oregon RPC 1.9(a)–(b).

B. *Determining When a Conflict Exists* .

1. *Former Client Conflicts*.

For purposes of the Oregon RPCs, a “matter” includes “any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties[.]” Oregon RPC 1.0(i). The scope of a matter and the degree of a lawyer's involvement in it depend on the facts of the particular situation or transaction.

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<sup>4</sup> Although all district attorneys' offices represent one client in criminal matters, i.e., the state, each district attorney's office is a separate “firm” for purposes of Oregon RPC 1.7–1.10. The relationship between district attorneys' offices is unlike that between branch offices of a private law firm. *See* ORS 8.610 (governing district attorneys' offices). *Compare Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F2d 1311, 1318 (7th Cir 1978) (branch offices of private firms constitute one “firm” for conflict-of-interest purposes), *with First Small Business Investment Co. v. Intercapital Corp.*, 738 P2d 263, 267 (Wash 1987) (disqualification of one firm on conflict-of-interest grounds would not result per se in disqualification of a separate firm acting as co-counsel).

*See also* Oregon RPC 1.0(d):

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Absent the required consents, a lawyer who has been directly involved in a client's specific legal proceeding or transaction cannot subsequently represent other clients with materially adverse interests in that same proceeding or transaction. On the other hand, a lawyer who has handled several matters of a type for a client is not thereafter precluded from representing another client in a factually distinct matter of the same type, even if the subsequent client's interests are adverse to the interests of the former client. The underlying question is whether the lawyer's involvement in the matter was such that subsequent representation of another client constitutes a changing of sides in the matter in question. ABA Model Rule 1.9 comment [2].

Matters are "substantially related" within the meaning of Oregon RPC 1.9 if they involve the same matter or transaction or if there "otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." ABA Model Rule 1.9 comment [3]. Under *former* DR 5-105(C), the first of these was referred to as a "matter-specific" conflict, and the latter was referred to as an "information-specific" conflict.

In *In re Brandsness*, which was decided under *former* DR 5-105, the court concluded that lawyer Brandsness had both a matter-specific and an information-specific former client conflict when he represented a husband in dissolution proceedings that included an effort to prevent the wife from continuing to participate in what had been the family business. The court held that, because Brandsness had previously represented both the wife and the husband in the formation and operation of the business, his attempt to preclude her from participating in its operation was sufficiently related to his earlier representation as to constitute a conflict. The court held, however, that the case was at the periphery of such a conflict. *In re Brandsness*, 299 Or at 433. *See also* OSB Formal Ethics Op No 2005-11.

In the situation presented here, if Lawyer *A* endeavored to bring a robbery prosecution against a former client and the robbery appeared to be part of a pattern of robberies, and if Lawyer *A* had previously participated in the defense of the former client in one of those robberies, the new prosecution would be substantially related to Lawyer *A*'s prior defense of the former client and would constitute a former client conflict under Oregon RPC 1.9(a). Conversely, if the robbery defendant previously had been defended by Lawyer *A* in a DUII matter, there would be a conflict only if Lawyer *A* acquired confidential information while representing the former client that could materially advance the prosecution of the robbery case.<sup>5</sup>

## 2. *Former Firm Conflicts.*

Former client conflicts can arise not only from being formally assigned to work on a matter, but also from less formal contacts. Suppose, for example, that while Lawyer *A* was still

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<sup>5</sup> Confidential information is "information relating to the representation of a client," and includes both information protected by the attorney-client privilege under applicable law and "other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Oregon RPC 1.0(f).

at the *ABC* firm, Lawyer *B* had informally sought and obtained Lawyer *A*'s advice with respect to a matter that Lawyer *B* was otherwise handling. Upon Lawyer *A*'s subsequent departure from the *ABC* firm, Lawyer *A* would be prohibited from representing a new client in a matter that is the same or substantially related to the matter Lawyer *B* consulted about if the interests of the former firm's client and Lawyer *A*'s new client are adverse and if Lawyer *A* acquired confidential information material to the new matter. Oregon RPC 1.9(b).

No exhaustive description of what constitutes confidential client information can be given. *Cf.* OSB Formal Ethics Op No 2005-17. Nevertheless, several illustrations may be helpful, and lawyers should be mindful that former client conflicts based on the acquisition of material confidential information can arise from informal exchanges within a firm. If Lawyer *A* was assigned to prosecute a DUII charge against a defendant who had previously been represented by another lawyer at the *ABC* firm, during the course of which representation Lawyer *A* acquired actual knowledge about the defendant's drinking problems, Lawyer *A* would have a former client conflict based on possession of that material information. But if Lawyer *A* had never discussed the details of the *ABC* firm's representation of the defendant and acquired no confidential information material to the DUII prosecution, the fact that Lawyer *A*'s former firm had such information does not disqualify Lawyer *A* from prosecuting the new charge.

C. *Representation with Informed Consent, Confirmed in Writing.*

If a conflict exists with respect to a former client, a lawyer may not proceed without informed consent, confirmed in writing, from both the former client and the current client. Oregon RPC 1.9, 1.11(d)(2)(v); OSB Formal Ethics Op Nos 2005-11, 2005-17. *See also In re Balocca*, 342 Or 279, 296, 151 P3d 154 (2007). This means that, in the absence of informed consent of the former client and the state, Lawyer *A* could not do *any* work on a matter—even preliminary discovery or legal research.

D. *No Imputation of Conflict to Other Members of the District Attorney's Office.*

Under Oregon RPC 1.10(c), "no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter." However, under Oregon RPC 1.10(e), "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." In a situation in which a lawyer becomes a government employee, such as Lawyer *A*'s employment with the district attorney's office, Oregon RPC 1.11(d) controls the analysis regarding imputation of the conflict and screening, if Lawyer *A* is personally disqualified because consent to a conflict is not given.

Oregon RPC 1.11(d) provides, in pertinent part:

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:



- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:

...

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public officer to represent a private client.

(v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing[.]

Oregon RPC 1.11(d) contains no provision that imputes a conflict to other lawyers associated with the disqualified lawyer in a government law firm.<sup>6</sup> Comment [2] to ABA Model Rule 1.11 explains:

Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

*See also* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §15.3, at 15-10 (3d ed Supp 2005-1) (“woodenly applying the automatic imputation rule that usually governs private law firms would be impractical and against the public interest”).

Therefore, while the Oregon RPCs do not impute Lawyer *A*'s conflicts to other members of the district attorney's office, and so screening is not required, it is prudent to screen Lawyer *A* from those matters in which Lawyer *A* is disqualified. HAZARD & HODES, *supra*, §15.9, at 15-32.

## II. *Question No. 2 (Government Service to Private Practice).*

Oregon RPC 1.6, 1.7,<sup>8</sup> and 1.9 apply to Lawyer *D* (who is transferring from government service to private practice), just as they apply to Lawyer *A* (who is transferring

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<sup>6</sup> Under Oregon RPC 1.11(b), however, a conflict is imputed to other members of a *former* government employee's firm, as will be discussed in Question No. 2.

<sup>8</sup> Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

from private practice to government service). With respect to Lawyer *D*, as with Lawyer *A*, Oregon RPC 1.11 governs the disqualification and imputation analysis, pursuant to Oregon RPC 1.10(e).

Oregon RPC 1.11(a), (b), and (c), which relate to former government lawyers, provide:

- (a) Except as Rule 1.12 or law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
  - (1) is subject to Rule 1.9(c); and
  - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

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(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c).

Oregon RPC 1.11(a) prohibits Lawyer *D* from representing criminal defendants in matters in which Lawyer *D* “participated personally and substantially” while a government prosecutor. *See* ABA Formal Ethics Op No 342 (1975) (“substantial responsibility” . . . contemplates a responsibility requiring the official to become personally involved to an important, material degree”); *Cleary v. District Court*, 704 P2d 866, 870 (Colo 1985) (the critical test of improper conduct by former government employees is the requirement that the attorney have “substantial responsibility” in the matter while employed by the government). Thus, if Lawyer *D* did no work on a particular matter or acquired no material confidential information from Lawyer *D*’s “former client” (i.e., the state)<sup>9</sup> while at the district attorney’s office, neither Lawyer *D* nor the *DEF* law partnership would be limited in the subsequent handling of the matter. If, however, Lawyer *D* worked on a matter or acquired information protected by Oregon RPC 1.6 that is sufficiently capable of adverse use, Oregon RPC 1.6, 1.7, 1.9, and 1.11 would prohibit Lawyer *D* from handling the matter absent informed consent, confirmed in writing.

Lawyer *D* also may be disqualified by the acquisition of “confidential government information” that does not constitute confidential client information. District attorneys and their deputies are public officials. ORS 8.610, 8.760. The reference in Oregon RPC 1.11(c) to information that “the government . . . has a legal privilege not to disclose” may encompass information that would not otherwise constitute confidential client information under Oregon RPC 1.6, but which the government is not required to disclose. *See* HAZARD & HODES, *supra*, §15.8. Absent government consent in the case of government-privileged information, Lawyer *D* may not work on a matter in private practice in which Lawyer *D* had previously acquired “confidential government information.”

Even if Lawyer *D* must be disqualified for the reasons discussed above, imputing Lawyer *D*’s disqualification to the other members of the *DEF* firm can be avoided if Lawyer *D* is screened in accordance with Oregon RPC 1.10(c) and written notice is given promptly to the district attorney’s office as provided in Oregon RPC 1.11(b).

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<sup>9</sup> *See* OSB Formal Ethics Op No 2005-122.

III. *Question No. 3 (Judicial Service to Private Practice).*

Oregon RPC 1.6, 1.7, and 1.9 do not apply to Judge *G* (who is leaving judicial service for private practice) because the litigants who appeared before Judge *G* were not Judge *G*'s clients. Oregon RPC 1.11(a), (c), and (d) also do not apply for that reason. Lawyer *G*'s subsequent representation of litigants is limited, however, by Oregon RPC 1.12(a):

Except as stated in paragraph (d) and Rule 2.4(b), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

The personal-and-substantial-participation requirement means that Lawyer *G* must have become "personally involved to an important, material degree" before Lawyer *G* will be disqualified. *See* ABA Formal Ethics Op No 342, *supra*. What is "important" or "material" varies with the circumstances. In the ordinary course, however, Lawyer *G* must have done something more than review the status of a matter in court or at docket call or permit the entry of a stipulated order before Lawyer *G*'s involvement will be deemed to have been personal and substantial. *See* ABA Model Rule 1.12 comment [1] (personal and substantial participation does not include "remote or incidental administrative responsibility that did not affect the merits"). If Lawyer *G* did not participate personally and substantially in a matter as a judge, neither Lawyer *G* nor the other lawyers in the *GHI* firm would be limited in their handling of the matter.

Oregon RPC 1.12(a) provides, however, that if Lawyer *G* participated personally and substantially as a judge, Lawyer *G* may not work on a matter without the informed consent of all parties, confirmed in writing. Furthermore, Lawyer *G*'s disqualification is imputed to the other members of the firm under Oregon RPC 1.12(c), unless Lawyer *G* is screened from the matter.

Oregon RPC 1.12(c) provides:

- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
  - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

Thus, if Lawyer *G* is screened in accordance with Oregon RPC 1.10(c) and written notice is provided in accordance with Oregon RPC 1.12(c)(2), the other lawyers in the *GHI* firm may proceed with the representation.

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COMMENT: For additional information on this topic and other related subjects, see THE ETHICAL OREGON LAWYER §§9.2–9.5, 9.22–9.23, 14.27 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 132–133 (2003); and ABA Model Rules 1.9–1.12.

**FORMAL OPINION NO. 2005-120**

[REVISED 201507]

**Conflicts of Interest, Former Clients:  
Lawyer Changing Firms, Former Prosecutor or Judge,  
Disqualification, Screening**

**Facts:**

The *ABC* law partnership does criminal defense work. Lawyer *A* proposes to leave the partnership and go to work as a deputy district attorney for the state.

Deputy District Attorney *D* proposes to leave the district attorney's office and join with Lawyer *E* and Lawyer *F* to form the *DEF* law partnership. The *DEF* law partnership proposes to represent criminal defendants in criminal cases that would be brought by the district attorney's office.

Circuit Court Judge *G* proposes to leave the bench and join with Lawyer *H* and Lawyer *I* to form the *GHI* law partnership. The *GHI* law partnership proposes to represent or oppose clients who had matters pending before Lawyer *G* while Lawyer *G* was a judge.

**Questions:**

1. To what extent may Lawyer *A* or other lawyers in the district attorney's office prosecute clients of the *ABC* law partnership?
2. To what extent may Lawyer *D* or other lawyers in the *DEF* law partnership represent criminal defendants in criminal matters?
3. To what extent may Lawyer *G* or other lawyers in the *GHI* law partnership represent or oppose parties who had matters pending before Lawyer *G* when Lawyer *G* was on the bench?

**Conclusions:**

1. With respect to Lawyer *A*, who is leaving private criminal defense practice to become a deputy district attorney, a three-part answer is appropriate:
  - a. Lawyer *A* cannot prosecute a person who was formerly represented by Lawyer *A* in the same or a substantially related matter, unless the former client and the state give informed consent, confirmed in writing.
  - b. Lawyer *A* cannot prosecute a former client of the *ABC* firm about whom Lawyer *A* obtained confidential information that is material to the matter without the informed consent of the *ABC* firm's former client and the state, confirmed in writing.

- c. Lawyer A's disqualification is not imputed to the other lawyers in the district attorney's office under Oregon RPC 1.11(d).
2. With respect to Lawyer D, who is leaving the district attorney's office for private criminal defense practice, a similar three-part answer is appropriate:
  - a. Lawyer D cannot defend clients in matters that are the same or substantially related to matters that Lawyer D handled at the district attorney's office, unless the client and the state give informed consent, confirmed in writing.
  - b. Lawyer D cannot defend a client on a matter that was prosecuted by other deputy district attorneys during Lawyer D's tenure in the office if Lawyer D obtained confidential information that is material to the matter, except with the informed consent of the client and the state, confirmed in writing.
  - c. Lawyer D's disqualification will be imputed to the other lawyers in the DEF firm, unless Lawyer D is screened from participating in the matter pursuant to Oregon RPC 1.10(c).
3. With respect to Lawyer G, who is leaving the bench for private practice, a three-part answer also is appropriate:
  - a. If Lawyer G did not participate personally and substantially as a judge in a matter in which Lawyer G or the GHI firm proposes to represent a party, neither Lawyer G nor other lawyers in the GHI firm would be prohibited from handling the matter.
  - b. If Lawyer G participated personally or substantially in a matter as a judge, Lawyer G cannot work on that matter in private practice without the informed consent of all parties, confirmed in writing.
  - c. Lawyer G's disqualification will be imputed to the other lawyers in the GHI firm, unless Lawyer G is screened from participating in the matter pursuant to Oregon RPC 1.10(c).

**Discussion:**

I. *Question No. 1 (Private Practice to Government Service).*

A. *Introduction*

When Lawyer A leaves the ABC firm, Lawyer A will have a "former client" relationship with the firm's clients for purposes of Oregon RPC 1.9.<sup>1</sup> See *In re Brandsness*, 299 Or 420,

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<sup>1</sup> Oregon RPC 1.9 provides:

427–428, 702 P2d 1098 (1985). Pursuant to Oregon RPC 1.9(a), a lawyer is prohibited from acting adversely to a former client if the current and former matters are the same or substantially related. Matters are “substantially related” if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in the prior representation would materially advance the current client’s position in the new matter. Oregon RPC 1.9(ad); ABA Model Rule 1.9 comment [3].

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(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are “substantially related” if (1) the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s position in the subsequent matter.



A lawyer also will have a conflict with a client of the lawyer's former law firm, even if the lawyer did no work on the client's matters at the former firm, if the lawyer acquired confidential information material to the current client's matter. Oregon RPC 1.9(b); OSB Formal Ethics Op Nos 2005-11, 2005-17.

If a conflict exists under either Oregon RPC 1.9(a) or (b), the lawyer may proceed with the representation if all affected clients give their informed consent, confirmed in writing.<sup>2</sup> The duties owed to former clients under ORS 9.460(3) and Oregon RPC 1.6<sup>3</sup> are coextensive with the duties under Oregon RPC 1.9. OSB Formal Ethics Op No 2005-17.

<sup>2</sup> Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

<sup>3</sup> Oregon RPC 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules: . . . [.]

ORS 9.460(3) requires a lawyer to "[m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490."

It follows that, unless a particular prosecution would result in Lawyer *A*'s being adverse to one of Lawyer *A*'s former clients in a matter that is the same or substantially related to Lawyer *A*'s prior representation of the client, or unless Lawyer *A* acquired confidential information about a client represented by another member of Lawyer *A*'s former firm, neither Lawyer *A* nor any other lawyer in the district attorney's office would be disqualified from handling the matter. Even if such a conflict existed, on obtaining informed consent, confirmed in writing, Lawyer *A* and the other lawyers in the office could proceed.<sup>4</sup> Oregon RPC 1.9(a)–(b).

B. *Determining When a Conflict Exists* .

1. *Former Client Conflicts*.

For purposes of the Oregon RPCs, a “matter” includes “any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties[.]” Oregon RPC 1.0(i). The scope of a matter and the degree of a lawyer's involvement in it depend on the facts of the particular situation or transaction.

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<sup>4</sup> Although all district attorneys' offices represent one client in criminal matters, i.e., the state, each district attorney's office is a separate “firm” for purposes of Oregon RPC 1.7–1.10. The relationship between district attorneys' offices is unlike that between branch offices of a private law firm. *See* ORS 8.610 (governing district attorneys' offices). *Compare Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F2d 1311, 1318 (7th Cir 1978) (branch offices of private firms constitute one “firm” for conflict-of-interest purposes), *with First Small Business Investment Co. v. Intercapital Corp.*, 738 P2d 263, 267 (Wash 1987) (disqualification of one firm on conflict-of-interest grounds would not result per se in disqualification of a separate firm acting as co-counsel).

*See also* Oregon RPC 1.0(d):

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Absent the required consents, a lawyer who has been directly involved in a client's specific legal proceeding or transaction cannot subsequently represent other clients with materially adverse interests in that same proceeding or transaction. On the other hand, a lawyer who has handled several matters of a type for a client is not thereafter precluded from representing another client in a factually distinct matter of the same type, even if the subsequent client's interests are adverse to the interests of the former client. The underlying question is whether the lawyer's involvement in the matter was such that subsequent representation of another client constitutes a changing of sides in the matter in question. ABA Model Rule 1.9 comment [2].

Matters are "substantially related" within the meaning of Oregon RPC 1.9 if they involve the same matter or transaction or if there "otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." ABA Model Rule 1.9 comment [3]. Under *former* DR 5-105(C), the first of these was referred to as a "matter-specific" conflict, and the latter was referred to as an "information-specific" conflict.

In *In re Brandsness*, which was decided under *former* DR 5-105, the court concluded that lawyer Brandsness had both a matter-specific and an information-specific former client conflict when he represented a husband in dissolution proceedings that included an effort to prevent the wife from continuing to participate in what had been the family business. The court held that, because Brandsness had previously represented both the wife and the husband in the formation and operation of the business, his attempt to preclude her from participating in its operation was sufficiently related to his earlier representation as to constitute a conflict. The court held, however, that the case was at the periphery of such a conflict. *In re Brandsness*, 299 Or at 433. *See also* OSB Formal Ethics Op No 2005-11.

In the situation presented here, if Lawyer *A* endeavored to bring a robbery prosecution against a former client and the robbery appeared to be part of a pattern of robberies, and if Lawyer *A* had previously participated in the defense of the former client in one of those robberies, the new prosecution would be substantially related to Lawyer *A*'s prior defense of the former client and would constitute a former client conflict under Oregon RPC 1.9(a). Conversely, if the robbery defendant previously had been defended by Lawyer *A* in a DUII matter, there would be a conflict only if Lawyer *A* acquired confidential information while representing the former client that could materially advance the prosecution of the robbery case.<sup>5</sup>

## 2. *Former Firm Conflicts.*

Former client conflicts can arise not only from being formally assigned to work on a matter, but also from less formal contacts. Suppose, for example, that while Lawyer *A* was still

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<sup>5</sup> Confidential information is "information relating to the representation of a client," and includes both information protected by the attorney-client privilege under applicable law and "other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Oregon RPC 1.0(f).

at the *ABC* firm, Lawyer *B* had informally sought and obtained Lawyer *A*'s advice with respect to a matter that Lawyer *B* was otherwise handling. Upon Lawyer *A*'s subsequent departure from the *ABC* firm, Lawyer *A* would be prohibited from representing a new client in a matter that is the same or substantially related to the matter Lawyer *B* consulted about if the interests of the former firm's client and Lawyer *A*'s new client are adverse and if Lawyer *A* acquired confidential information material to the new matter. Oregon RPC 1.9(b).

No exhaustive description of what constitutes confidential client information can be given. *Cf.* OSB Formal Ethics Op No 2005-17. Nevertheless, several illustrations may be helpful, and lawyers should be mindful that former client conflicts based on the acquisition of material confidential information can arise from informal exchanges within a firm. If Lawyer *A* was assigned to prosecute a DUII charge against a defendant who had previously been represented by another lawyer at the *ABC* firm, during the course of which representation Lawyer *A* acquired actual knowledge about the defendant's drinking problems, Lawyer *A* would have a former client conflict based on possession of that material information. But if Lawyer *A* had never discussed the details of the *ABC* firm's representation of the defendant and acquired no confidential information material to the DUII prosecution, the fact that Lawyer *A*'s former firm had such information does not disqualify Lawyer *A* from prosecuting the new charge.

C. *Representation with Informed Consent, Confirmed in Writing.*

If a conflict exists with respect to a former client, a lawyer may not proceed without informed consent, confirmed in writing, from both the former client and the current client. Oregon RPC 1.9, 1.11(d)(2)(v); OSB Formal Ethics Op Nos 2005-11, 2005-17. *See also In re Balocca*, 342 Or 279, 296, 151 P3d 154 (2007). This means that, in the absence of informed consent of the former client and the state, Lawyer *A* could not do *any* work on a matter—even preliminary discovery or legal research.

D. *No Imputation of Conflict to Other Members of the District Attorney's Office.*

Under Oregon RPC 1.10(c), "no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter." However, under Oregon RPC 1.10(e), "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." In a situation in which a lawyer becomes a government employee, such as Lawyer *A*'s employment with the district attorney's office, Oregon RPC 1.11(d) controls the analysis regarding imputation of the conflict and screening, if Lawyer *A* is personally disqualified because consent to a conflict is not given.

Oregon RPC 1.11(d) provides, in pertinent part:

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:

...

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public officer to represent a private client.

(v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing[.]

Oregon RPC 1.11(d) contains no provision that imputes a conflict to other lawyers associated with the disqualified lawyer in a government law firm.<sup>6</sup> Comment [2] to ABA Model Rule 1.11 explains:

Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

*See also* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §15.3, at 15-10 (3d ed Supp 2005-1) (“woodenly applying the automatic imputation rule that usually governs private law firms would be impractical and against the public interest”).

Therefore, while the Oregon RPCs do not impute Lawyer *A*'s conflicts to other members of the district attorney's office, and so screening is not required, it is prudent to screen Lawyer *A* from those matters in which Lawyer *A* is disqualified. HAZARD & HODES, *supra*, §15.9, at 15-32.

## II. *Question No. 2 (Government Service to Private Practice).*

Oregon RPC 1.6, 1.7,<sup>8</sup> and 1.9 apply to Lawyer *D* (who is transferring from government service to private practice), just as they apply to Lawyer *A* (who is transferring

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<sup>6</sup> Under Oregon RPC 1.11(b), however, a conflict is imputed to other members of a *former* government employee's firm, as will be discussed in Question No. 2.

<sup>8</sup> Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

from private practice to government service). With respect to Lawyer *D*, as with Lawyer *A*, Oregon RPC 1.11 governs the disqualification and imputation analysis, pursuant to Oregon RPC 1.10(e).

Oregon RPC 1.11(a), (b), and (c), which relate to former government lawyers, provide:

- (a) Except as Rule 1.12 or law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
  - (1) is subject to Rule 1.9(c); and
  - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

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(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c).

Oregon RPC 1.11(a) prohibits Lawyer *D* from representing criminal defendants in matters in which Lawyer *D* “participated personally and substantially” while a government prosecutor. *See* ABA Formal Ethics Op No 342 (1975) (“substantial responsibility” . . . contemplates a responsibility requiring the official to become personally involved to an important, material degree”); *Cleary v. District Court*, 704 P2d 866, 870 (Colo 1985) (the critical test of improper conduct by former government employees is the requirement that the attorney have “substantial responsibility” in the matter while employed by the government). Thus, if Lawyer *D* did no work on a particular matter or acquired no material confidential information from Lawyer *D*’s “former client” (i.e., the state)<sup>9</sup> while at the district attorney’s office, neither Lawyer *D* nor the *DEF* law partnership would be limited in the subsequent handling of the matter. If, however, Lawyer *D* worked on a matter or acquired information protected by Oregon RPC 1.6 that is sufficiently capable of adverse use, Oregon RPC 1.6, 1.7, 1.9, and 1.11 would prohibit Lawyer *D* from handling the matter absent informed consent, confirmed in writing.

Lawyer *D* also may be disqualified by the acquisition of “confidential government information” that does not constitute confidential client information. District attorneys and their deputies are public officials. ORS 8.610, 8.760. The reference in Oregon RPC 1.11(c) to information that “the government . . . has a legal privilege not to disclose” may encompass information that would not otherwise constitute confidential client information under Oregon RPC 1.6, but which the government is not required to disclose. *See* HAZARD & HODES, *supra*, §15.8. Absent government consent in the case of government-privileged information, Lawyer *D* may not work on a matter in private practice in which Lawyer *D* had previously acquired “confidential government information.”

Even if Lawyer *D* must be disqualified for the reasons discussed above, imputing Lawyer *D*’s disqualification to the other members of the *DEF* firm can be avoided if Lawyer *D* is screened in accordance with Oregon RPC 1.10(c) and written notice is given promptly to the district attorney’s office as provided in Oregon RPC 1.11(b).

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<sup>9</sup> *See* OSB Formal Ethics Op No 2005-122.

III. *Question No. 3 (Judicial Service to Private Practice).*

Oregon RPC 1.6, 1.7, and 1.9 do not apply to Judge *G* (who is leaving judicial service for private practice) because the litigants who appeared before Judge *G* were not Judge *G*'s clients. Oregon RPC 1.11(a), (c), and (d) also do not apply for that reason. Lawyer *G*'s subsequent representation of litigants is limited, however, by Oregon RPC 1.12(a):

Except as stated in paragraph (d) and Rule 2.4(b) ~~and in paragraph (d)~~, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

The personal-and-substantial-participation requirement means that Lawyer *G* must have become "personally involved to an important, material degree" before Lawyer *G* will be disqualified. *See* ABA Formal Ethics Op No 342, *supra*. What is "important" or "material" varies with the circumstances. In the ordinary course, however, Lawyer *G* must have done something more than review the status of a matter in court or at docket call or permit the entry of a stipulated order before Lawyer *G*'s involvement will be deemed to have been personal and substantial. *See* ABA Model Rule 1.12 comment [1] (personal and substantial participation does not include "remote or incidental administrative responsibility that did not affect the merits"). If Lawyer *G* did not participate personally and substantially in a matter as a judge, neither Lawyer *G* nor the other lawyers in the *GHI* firm would be limited in their handling of the matter.

Oregon RPC 1.12(a) provides, however, that if Lawyer *G* participated personally and substantially as a judge, Lawyer *G* may not work on a matter without the informed consent of all parties, confirmed in writing. Furthermore, Lawyer *G*'s disqualification is imputed to the other members of the firm under Oregon RPC 1.12(c), unless Lawyer *G* is screened from the matter.



Oregon RPC 1.12(c) provides:

- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
  - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

Thus, if Lawyer *G* is screened in accordance with Oregon RPC 1.10(c) and written notice is provided in accordance with Oregon RPC 1.12(c)(2), the other lawyers in the *GHI* firm may proceed with the representation.

~~Approved by Board of Governors, June 2007.~~

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COMMENT: For additional information on this topic and other related subjects, see THE ETHICAL OREGON LAWYER §§9.2–9.5, 9.22–9.23, 14.27 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 132–133 (2003); and ABA Model Rules 1.9–1.12.

**FORMAL OPINION NO. 2005-153**  
**Information About Legal Services:**  
**Insurer-Employed Lawyers' Firm Name**

**Facts:**

Lawyers *A* and *B* are employees of an insurer and defend insureds' liability claims for the insurer.

**Question:**

Can *A* and *B* refer to themselves on their letterhead and pleadings as "*A & B, Attorneys at Law*," "*A & B, Attorneys at Law, Not a Partnership*," or "*A and B, Attorneys at Law, an Association of Lawyers*," without disclosing their status as employees of the insurer?

**Conclusion:**

No.

**Discussion:**

Oregon RPC 7.1(a) provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Oregon RPC 7.5 provides, in pertinent part:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

\* \* \*

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

See also Oregon RPC 8.4(a)(3), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation . . ." In short, and as these and other sections illustrate, lawyers cannot mislead others, whether they are clients or third parties.

Courts in other jurisdictions have held that failure to identify lawyer employees of an insurer is misleading. In *In re Weiss, Healey & Rea*, 536 A2d 266, 268–269 (NJ 1988), the court said:

The question here is whether there is anything deceptive about the use of a name like “A, B & C” to describe the association of lawyer employees of an insurance company. We believe that it is evident that the mere use of the name “A, B & C” does not convey “with accuracy and clarity” the complex set of relationships that distinguish an association of lawyers representing a single insurer and its policyholders from an association of lawyers affiliated for the general practice of law. Yet, what secondary meaning *does* this form of firm name convey to the public? What does it tell us about the “kind and caliber” of legal services rendered by such an association?

We believe that the message conveyed by the firm name “A, B & C” is that the three persons designated are engaged in the general practice of law in New Jersey as partners. Such partnership implies the full financial and professional responsibility of a law firm that has pooled its resources of intellect and capital to serve a general clientele. The partnership arrangement implies much more than office space shared by representatives of a single insurer. Put differently, the designation “A, B & C” does not imply that the associated lawyers are in fact employees, with whatever inferences a client might draw about their ultimate interest and advice. The public, we believe, infers that the collective professional, ethical, and financial responsibility of a partnership-in-fact bespeaks the “kind and caliber of legal services rendered.”

In *Petition of Youngblood*, 895 SW2d 322, 331 (Tenn 1995), construing a rule similar to Oregon RPC 7.1 and 7.5 (*former* DR 2-102), the court held that “an attorney-employee is not ‘a separate and independent law firm.’ The representation that the attorney employee is separate and independent from the employer is, at least, false, misleading, and deceptive. It may be fraudulent, depending upon the circumstances under which the representation is made.”

See also California Formal Ethics Op No 1987-91 (1987 WL 109707), which concludes:

In the present context, the use of a firm name, other than “Law Division,” or an equivalent thereof, would be misleading in that clients of the Law Division—i.e., insureds—would be misled as to the relationship between the Insurance Company and its lawyers. Clients would be unaware that the individual lawyers were employed by the Insurance Company and would assume that the entity was a separate law firm. For this reason, the letterhead used must indicate the relationship between the firm and the Law Division. For example, the letterhead could contain an asterisk identifying the firm as the Law Division for the Insurance Company.

Accordingly, a letterhead or other pleading that does not fully identify Lawyers *A* and *B* as employees of the insurer would be impermissible.

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COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.7, 2.12, 2.19 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2003); and ABA Model Rules 7.1, 7.5.

**FORMAL OPINION NO. 2005-153**  
**Information About Legal Services:**  
**Insurer-Employed Lawyers' Firm Name**

**Facts:**

Lawyers *A* and *B* are employees of an insurer and defend insureds' liability claims for the insurer.

**Question:**

Can *A* and *B* refer to themselves on their letterhead and pleadings as "*A & B*, Attorneys at Law," "*A & B*, Attorneys at Law, Not a Partnership," or "*A* and *B*, Attorneys at Law, an Association of Lawyers," without disclosing their status as employees of the insurer?

**Conclusion:**

No.

**Discussion:**

Oregon RPC 7.1(a) provides:

~~(a) — A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~— (1) — contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~— (2) —~~

~~— (11) — is false or misleading in any manner not otherwise described above; or~~

~~— (12) — violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~  
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Oregon RPC 7.5 provides, in pertinent part:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

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~~\_\_\_\_\_ (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.~~

~~(e) — A lawyer in private practice:~~

~~—(1) — shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm.~~

~~\_\_\_\_\_~~

~~—(e) — Lawyers shall not hold themselves out as practicing in a law firm unless the lawyers are actually members of the firm.~~

See also Oregon RPC 8.4(a)(3), which prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation\_\_\_\_\_.” In short, and as these and other sections illustrate, lawyers cannot mislead others, whether they are clients or third parties.

Courts in other jurisdictions have held that failure to identify lawyer employees of an insurer is misleading. In *In re Weiss, Healey & Rea*, 536 A2d 266, 268–269 (NJ 1988), the court said:

The question here is whether there is anything deceptive about the use of a name like “A, B & C” to describe the association of lawyer employees of an insurance company. We believe that it is evident that the mere use of the name “A, B & C” does not convey “with accuracy and clarity” the complex set of relationships that distinguish an association of lawyers representing a single insurer and its policyholders from an association of lawyers affiliated for the general practice of law. Yet, what secondary meaning *does* this form of firm name convey to the public? What does it tell us about the “kind and caliber” of legal services rendered by such an association?

We believe that the message conveyed by the firm name “A, B & C” is that the three persons designated are engaged in the general practice of law in New Jersey as partners. Such partnership implies the full financial and professional responsibility of a law firm that has pooled its resources of intellect and capital to serve a general clientele. The partnership arrangement implies much more than office space shared by representatives of a single insurer. Put differently, the designation “A, B & C” does not imply that the associated lawyers are in fact employees, with whatever inferences a client might draw about their ultimate interest and advice. The public, we believe, infers that the collective professional, ethical, and financial responsibility of a partnership-in-fact bespeaks the “kind and caliber of legal services rendered.”

In *Petition of Youngblood*, 895 SW2d 322, 331 (Tenn 1995), construing a rule ~~identical~~ similar to Oregon RPC 7.1 and 7.5 (*former* DR 2-102), the court held that “an attorney-employee is not ‘a separate and independent law firm.’ The representation that the attorney employee is separate and independent from the employer is, at least, false, misleading, and deceptive. It may be fraudulent, depending upon the circumstances under which the representation is made.”

See also California Formal Ethics Op No 1987-91 (1987 WL 109707), which concludes:

In the present context, the use of a firm name, other than “Law Division,” or an equivalent thereof, would be misleading in that clients of the Law Division—i.e., insureds—would be misled as to the relationship between the Insurance Company and its

lawyers. Clients would be unaware that the individual lawyers were employed by the Insurance Company and would assume that the entity was a separate law firm. For this reason, the letterhead used must indicate the relationship between the firm and the Law Division. For example, the letterhead could contain an asterisk identifying the firm as the Law Division for the Insurance Company.

Accordingly, a letterhead or other pleading that does not fully identify Lawyers *A* and *B* as employees of the insurer would be impermissible.

~~Approved by Board of Governors, August 2005.~~

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COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.7, 2.12, 2.19 (Oregon CLE 2003~~6~~); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2003); and ABA Model Rules 7.1, 7.5.

FORMAL OPINION NO 2006-176

[REVISED 2015]

Conflicts of Interest:

Lawyer Functioning in Multiple Roles in Client's Real Estate Transaction

**Facts:**

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as Lawyer, but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

**Question:**

May Lawyer serve in all three capacities?

**Conclusion:**

Yes, qualified.

**Discussion:**

1. *Potential Limitations of Substantive Law.*

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.

2. *Lawyer-Client Conflicts of Interest.*

These facts present the potential for conflicts of interest between the Client and the Lawyer. Oregon RPC 1.7 states, in part:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
  - (3) . . . .
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (4) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
  - (5) each affected client gives informed consent, confirmed in writing.

Under Oregon RPC 1.7, Lawyer's other business interests in the real estate transaction could give rise to a conflict under Oregon RPC 1.7(a)(2) because there is a significant risk that these other roles might interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. Considering an Oregon lawyer's efforts to fulfill his function as both a Lawyer and a realtor, the Supreme Court said:

. . . contrary to the accused's argument, the [lawyer's] interest in acquiring a share of the sales commission is not identical to a lawyer's interest in recovering a contingency fee. A lawyer will recover a contingency fee only if the client succeeds in the matter on which the lawyer provides legal representation. In contrast, the [lawyer's] ability to recover a sales commission did not turn on whether he advanced [his client's] legal interests in the transaction. Indeed, an insistence on protecting [his client's] legal interests could have prevented a sale from closing that, from a broker's perspective, may have made business sense.



Therein, we think, lies the problem in the accused's serving as both [his client's] broker and lawyer. In advancing his client's business interests as a broker, the accused may have discounted risks that, as a lawyer, he should counsel his client to avoid or at least be aware of.<sup>1</sup>

It follows that if Lawyer undertakes multiple roles resulting in a conflict, Lawyer must comply with each of the requirements of Oregon RPC 1.7(b).<sup>2</sup> Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in Lawyer's additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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<sup>1</sup> This opinion has been revised following the Court's opinion, *In re Conduct of Spencer*, 355 Or 679, 697 (2014), in which the court rejected the suggestion that simultaneously acting as attorney, real estate broker, and mortgage broker would, per se, constitute a current conflict of interest. The court said :

If, as other jurisdictions have held, additional aspects of a real estate transaction (on which the Bar does not rely here) can result in a current conflict under RPC 1.7(a)(2), careful lawyers who seek to serve as both a client's legal advisor and broker in the same real estate transaction would be advised to satisfy the advice and consent requirements of both RPC 1.8(a) and RPC 1.7(b). See ABA Model Rules, Rule 1.8, comment [3] (recognizing that the same transaction can implicate both rules and require that both consent requirements be satisfied).

<sup>2</sup> As noted above, we have assumed that multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client's informed consent<sup>3</sup> and to confirm that consent in a contemporaneous writing.<sup>4</sup> See Oregon RPC 1.7(b)(4), 1.8(a)(3).<sup>5</sup> The informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client's waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7., Lawyer must also receive Client's informed consent "in a writing signed by the client."
- Lawyer's writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer's business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client's Lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity and the circumstances under which each such fee would be payable (*e.g.*, only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer's other roles.<sup>6</sup>

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<sup>3</sup> Oregon RPC 1.0(g) provides:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

<sup>4</sup> Oregon RPC 1.0(b) provides:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

<sup>5</sup> For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op Nos 2005-10 (in addition to lawyer's private practice, lawyer also owns a real estate firm and a title insurance company that occasionally do business with lawyer's clients) and 2005-28 (discussing conflict of interest in representing both sides in adoption).

<sup>6</sup> For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 005-32.

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client in writing that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.
- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer's duties of confidentiality under Oregon RPC 1.6.6. Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.6<sup>7</sup>, and Lawyer must explain to Client why this distinction is potentially significant.<sup>8</sup> This explanation must be given whether

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<sup>7</sup> Oregon RPC 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
  - (2) to prevent reasonably certain death or substantial bodily harm;
  - (3) to secure legal advice about the lawyer's compliance with these Rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law, court order, or as permitted by these Rules; or
  - (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. . . .

<sup>8</sup> See, e.g., *United States v. Huberts*, 637 F2d 630, 639–640 (9th Cir 1980), cert. denied, 451 US 975 (1981) (lawyer as business agent; no privilege); *United States v. Davis*, 636 F2d 1028, 1043–1044 (5th Cir), cert. denied, 454 US 862 (1981) (lawyer as tax preparer; no privilege); *Diamond v. City of Mobile*, 86 FRD 324, 327–328 (SD Ala 1978) (lawyer as investigator; no privilege); *Neuder v. Battelle Pacific Northwest Nat'l Lab*, 194 FRD 289, 292–297 (DDC 2000) (when corporate lawyer acts in nonlegal capacity in connection with employment decisions, communications between lawyer and corporate representatives not privileged). A variant could arise if Lawyer's role were ambiguous, resulting in

Lawyer's multiple roles are carried out from a single office or from physically distinct offices.<sup>9</sup>

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be "fair and reasonable" pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the "fair and reasonable" requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve Lawyers' business relations with Clients when the Client is relatively sophisticated. *See, e.g., Atlantic Richfield Co. v. Sybert*, 441 A2d 1079 (Md Ct Spec App 1982) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); *McCray v. Weinberg*, 340 NE2d 518 (Mass App Ct 1976) (declining to set aside foreclosure of lawyer's mortgage loan, one of a series, to knowledgeable and experienced client).

The other requirement is that Lawyer must "reasonably believe that [Lawyer] will be able to provide competent and diligent representation to" Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so, but also that Lawyer's belief must be objectively reasonable under the circumstances. *See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §126, comment e (2000). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a Lawyer wishes to act both as legal counsel to and insurance agent for a Client or as legal counsel to and securities broker for a Client.<sup>10</sup> We cannot say that it will always be unreasonable for a Lawyer to conclude that the Lawyer can provide competent and diligent legal advice to a Client while also fulfilling other roles. We note, however, that there will be times when the Lawyer's conflicting obligations and interests will preclude such roles. Cf. *In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (same).

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Client's inability to carry the burden of proof on lawyer-client privilege. *See Groff v. S.I.A.C.*, 246 Or 557, 565-566, 426 P2d 738 (1967) (person asserting privilege has burden of showing that one asserting privilege and nature of testimony offered are both within ambit of privilege); ORS 40.030(1) (OEC 104(1)).

<sup>9</sup> The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party's ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer's ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.

<sup>10</sup> *See, e.g., Cal Formal Ethics Op No 1995-140* (lawyer as insurance broker); *NYSBA Formal Ethics Op No 2002-752* (lawyer may not provide real estate brokerage services in the same transaction as legal services); *NYSBA Formal Ethics Op No 2005-784* (lawyer also acting in entertainment management role).

3. *Additional Caveats and Concluding Remarks.*

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. See generally *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer's estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reasonable to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client's informed consent in a writing signed by the Client. Before concluding this opinion, however, we note three caveats:

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).<sup>11</sup>
- If Lawyer were to endeavor to use Lawyer's role as real estate broker or agent or mortgage broker or loan officer to obtain clients for Lawyer's practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 *et seq.*<sup>12</sup>

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<sup>11</sup> Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (legal fees paid by insurer).

<sup>12</sup> For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op Nos 2005-106 (lawyer who purchases tax advice business may not use that business to engage directly or indirectly in improper solicitation of legal clients), 2005-101 (lawyer and psychologist may market a joint "Family Mediation Center"), and 2005-108 (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).

- Lawyers covered by the Oregon State Bar Professional Liability Fund who do not wish to risk losing potentially available legal malpractice coverage should contact the PLF about exclusions that may apply.

FORMAL OPINION NO 2006-176

[REVISED 2015]

Conflicts of Interest:

Lawyer Functioning in Multiple Roles in Client's Real Estate Transaction

**Facts:**

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as Lawyer, but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

**Question:**

May Lawyer serve in all three capacities?

**Conclusion:**

Yes, qualified.

**Discussion:**

1. *Potential Limitations of Substantive Law.*

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.

2. *Lawyer-Client Conflicts of Interest.*

These facts present the potential for conflicts of interest between the Client and the Lawyer. Oregon RPC 1.7 states, in part:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
  - (3) . . . .
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (4) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
  - (5) each affected client gives informed consent, confirmed in writing.

Under Oregon RPC 1.7, Lawyer's other business interests in the real estate transaction ~~would-could~~ give rise to a conflict under Oregon RPC 1.7(a)(2) ~~since-because~~ there is a significant risk that these other roles ~~would-might~~ interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. ~~In either instance, Lawyer's interest in fees or income from these other roles, if not also Lawyer's liability concerns from those other roles, would create a significant risk that Lawyer's ability to "exercise independent professional judgment and render candid advice" (Oregon RPC 2.1) would be compromised. Considering an Oregon lawyer's efforts to fulfill his function as both a Lawyer and a realtor, the Supreme Court said:~~

. . . contrary to the accused's argument, the [lawyer's] interest in acquiring a share of the sales commission is not identical to a lawyer's interest in recovering a contingency fee. A lawyer will recover a contingency fee only if the client succeeds in the matter on which the lawyer provides legal representation. In



contrast, the [lawyer's] ability to recover a sales commission did not turn on whether he advanced [his client's] legal interests in the transaction. Indeed, an insistence on protecting [his client's] legal interests could have prevented a sale from closing that, from a broker's perspective, may have made business sense. Therein, we think, lies the problem in the accused's serving as both [his client's] broker and lawyer. In advancing his client's business interests as a broker, the accused may have discounted risks that, as a lawyer, he should counsel his client to avoid or at least be aware of.<sup>1</sup>

It follows that if Lawyer ~~can undertake~~undertakes multiple roles only if resulting in a conflict, Lawyer can and does must comply with each of the requirements of Oregon RPC 1.7(b).<sup>2</sup> Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in Lawyer's additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

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<sup>1</sup> This opinion has been revised following the Court's opinion, In re Conduct of Spencer, 355 Or 679, 697 (2014), in which the court rejected the suggestion that simultaneously acting as attorney, real estate broker, and mortgage broker would, per se, constitute a current conflict of interest. The court said :

If, as other jurisdictions have held, additional aspects of a real estate transaction (on which the Bar does not rely here) can result in a current conflict under RPC 1.7(a)(2), careful lawyers who seek to serve as both a client's legal advisor and broker in the same real estate transaction would be advised to satisfy the advice and consent requirements of both RPC 1.8(a) and RPC 1.7(b). See ABA Model Rules, Rule 1.8, comment [3] (recognizing that the same transaction can implicate both rules and require that both consent requirements be satisfied).

<sup>2</sup> As noted above, we have assumed that multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).

- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client's informed consent<sup>3</sup> and to confirm that consent in a contemporaneous writing.<sup>4</sup> See Oregon RPC 1.7(b)(4), 1.8(a)(3).<sup>5</sup> The informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client's waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7., Lawyer must also receive Client's informed consent "in a writing signed by the client."
- Lawyer's writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer's business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client's Lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity and the circumstances under which each such fee

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"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

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<sup>5</sup> For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op Nos 2005-10 (in addition to lawyer's private practice, lawyer also owns a real estate firm and a title insurance company that occasionally do business with lawyer's clients) and 2005-28 (discussing conflict of interest in representing both sides in adoption).

would be payable (*e.g.*, only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer's other roles.<sup>6</sup>

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client in writing that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.
- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer's duties of confidentiality under Oregon RPC 1.6.6. Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.6<sup>7</sup>, and Lawyer must explain to Client why this distinction is potentially significant.<sup>8</sup> This explanation must be given whether

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<sup>6</sup> For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 005-32.

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  - (2) to prevent reasonably certain death or substantial bodily harm;
  - (3) to secure legal advice about the lawyer's compliance with these Rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law, court order, or as permitted by these Rules; or
  - (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. . . .

<sup>8</sup> See, *e.g.*, *United States v. Huberts*, 637 F2d 630, 639–640 (9th Cir 1980), cert. denied, 451 US 975

Lawyer's multiple roles are carried out from a single office or from physically distinct offices.<sup>9</sup>

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be "fair and reasonable" pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the "fair and reasonable" requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve Lawyers' business relations with Clients when the Client is relatively sophisticated. *See, e.g., Atlantic Richfield Co. v. Sybert*, 441 A2d 1079 (Md Ct Spec App 1982) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); *McCray v. Weinberg*, 340 NE2d 518 (Mass App Ct 1976) (declining to set aside foreclosure of lawyer's mortgage loan, one of a series, to knowledgeable and experienced client).

The other requirement is that Lawyer must "reasonably believe that [Lawyer] will be able to provide competent and diligent representation to" Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so, but also that Lawyer's belief must be objectively reasonable under the circumstances. *See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §126, comment e (2000). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a Lawyer wishes to act both as legal counsel to and insurance agent for a Client or as legal counsel to and securities broker for a Client.<sup>10</sup> We cannot say that it will always be unreasonable for a Lawyer to conclude that the Lawyer can provide competent and

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(1981) (lawyer as business agent; no privilege); *United States v. Davis*, 636 F2d 1028, 1043–1044 (5th Cir), cert. denied, 454 US 862 (1981) (lawyer as tax preparer; no privilege); *Diamond v. City of Mobile*, 86 FRD 324, 327–328 (SD Ala 1978) (lawyer as investigator; no privilege); *Neuder v. Battelle Pacific Northwest Nat'l Lab*, 194 FRD 289, 292–297 (DDC 2000) (when corporate lawyer acts in nonlegal capacity in connection with employment decisions, communications between lawyer and corporate representatives not privileged). A variant could arise if Lawyer's role were ambiguous, resulting in Client's inability to carry the burden of proof on lawyer-client privilege. *See Groff v. S.I.A.C.*, 246 Or 557, 565–566, 426 P2d 738 (1967) (person asserting privilege has burden of showing that one asserting privilege and nature of testimony offered are both within ambit of privilege); ORS 40.030(1) (OEC 104(1)).

<sup>9</sup> The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party's ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer's ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.

<sup>10</sup> *See, e.g., Cal Formal Ethics Op No 1995-140* (lawyer as insurance broker); *NYSBA Formal Ethics Op No 2002-752* (lawyer may not provide real estate brokerage services in the same transaction as legal services); *NYSBA Formal Ethics Op No 2005-784* (lawyer also acting in entertainment management role).

diligent legal advice to a Client while also fulfilling other roles. We note, however, that there will be times when the Lawyer's conflicting obligations and interests will preclude such roles. Cf. *In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (same).

3. *Additional Caveats and Concluding Remarks.*

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. See generally *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer's estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reasonable to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client's informed consent in a writing signed by the Client. Before concluding this opinion, however, we note three caveats:

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).<sup>11</sup>
- If Lawyer were to endeavor to use Lawyer's role as real estate broker or agent or mortgage broker or loan officer to obtain clients for Lawyer's practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 *et seq.*<sup>12</sup>

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<sup>11</sup> Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (legal fees paid by insurer).

<sup>12</sup> For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op Nos 2005-106 (lawyer who purchases tax advice business may not use that business to engage

- Lawyers covered by the Oregon State Bar Professional Liability Fund who do not wish to risk losing potentially available legal malpractice coverage should ~~contact the PLF about exclusions that may apply. review Form ORPC 1 and Exclusions 5 and 8 of the PLF 2006 Claims Made Plan, which can be found at page 66 of the 2006 Oregon State Bar Membership Directory, or any later amendments thereto.~~

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directly or indirectly in improper solicitation of legal clients), 2005-101 (lawyer and psychologist may market a joint “Family Mediation Center”), and 2005-108 (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).



# Professional Liability Fund

16037 SW Upper Boones Ferry Road, Suite 300  
Tigard, Oregon 97224

PO Box 231600 | Tigard, Oregon 97281-1600

CAROL J. BERNICK  
CHIEF EXECUTIVE OFFICER

*Board of Directors  
and Officers*

JULIA I. MANELA  
CHAIR  
Eugene

ROBERT D. NEWELL  
VICE-CHAIR  
Portland

VALERIE D. SAIKI  
SECRETARY-TREASURER  
(PUBLIC MEMBER)  
Salem

IRA R. ZAROV  
Portland

TIM MARTINEZ  
(PUBLIC MEMBER)  
Salem

TERESA A. STATLER  
Portland

DENNIS H. BLACK  
Medford

SAVILLE W. EASLEY  
Portland

ROBERT S. RASCHIO  
Canyon City

August 24, 2015

To: OSB Board Development Committee  
From: Carol J. Bernick, PLF Chief Executive Officer  
Re: 2016 PLF Board Appointments

The Board of Directors of the Professional Liability Fund met on August 20, 2015 to consider potential applicants for the 2016-2020 Board terms. The BOD is required to send a list of nominees equal to or greater than the number of available positions to the OSB BOG.

Article 3.4 provides that:

By October 31 of each year the Board of Directors will forward to the Board of Governors a list of recommended Director nominees equal to or greater than the number of available positions on the Board in the coming year. The Board will seek nominees according to qualifications determined by the PLF Board. **These may include, but are not limited to, consideration of gender, minority status, ability, experience, type of law practice, and region.**

This year, 41 attorneys expressed interest in serving on the PLF Board. (Attorneys express their interest in two ways; either through the OSB Volunteer Preference Form or through direct communication with the PLF in response to a blast e-mail, articles or notices in *In Brief* or the OSB *Bulletin*.)

This year, there is one attorney board position to fill. Ira Zarov replaced John Berge. In addition, one of our public members, Valerie Saiki, also has an expiring term. Their terms expire on December 31, 2015. Their departure leaves the Board with:

- One member from Eugene;
- One member from Medford;
- One member from Canyon City;
- One public member from Salem; and
- Three members from Portland.

In terms of firm size, the Board (minus the one departing director and not counting the public members) has:

- One member from a large firm;
- Two members from medium firms;
- One member from a small firm; and
- Two solo practitioners.

The substantive expertise includes commercial litigation, creditors rights, criminal, family law, immigration, and personal injury.

### **Attorney Appointment**

The BOD chose two candidates from a list of six candidates presented by our nominations committee. Those two candidates are presented in order of preference (resumes attached).

**Molly Jo Mullen.** OSB #914969, Portland.

Ms. Mullen was a partner for over twenty years at the Bodyfelt firm. She has tried numerous jury and bench trials, primarily in tort defense, representing both small and large businesses. In mid-2015, she left Bodyfelt to open her own arbitration and mediation firm. Ms. Mullen served on our Defense Panel for most of her tenure at Bodyfelt and is well regarded by the Claims staff. She is interested in the PLF's efforts to promote women and younger attorneys as first-chair lawyers for assigned cases.

**Ronald L. Roome.** OSB #880976, Bend.

Mr. Roome currently has his own arbitration and mediation practice which he began in February 2013. For the 25 years prior to that, he was a partner at Karnopp Petersen in Bend, with an active civil litigation practice, including contracts, personal injury, employment, insurance, property, estates, wills and trusts, and other general civil litigation cases. He tried over 25 jury trials. His broad expertise in civil litigation would be a benefit as we are finding severity of claims increasing. He has served on the



Oregon State Bar Disciplinary Board, the Oregon Liquor Control Commission, a number of Deschutes County Bar Associations and Oregon State Bar programs, and is a past member of both OTLA and OADC. Mr. Roome is well regarded by the Bend community and received nothing but the highest praise from those claims attorneys who know him. He would bring complex litigation experience to the Board.

### **Public Appointment**

#### **Tom Newhouse. Portland**

Tom has over 30 years of accounting, financial and executive management experience. He is currently the Chief Operating Officer of PayLess Drug, an institutional pharmacy that serves over 10,000 customers from five locations in Oregon, Washington, and California, with annual sales of approximately \$80 million. Tom joined PayLess in 2002 as the CFO and assumed the COO position in 2005. He served as the CEO from 2009 to 2013 and was instrumental in the sale of PayLess in 2012 to Moda Health. Prior to joining PayLess, Tom served in senior management on both the technology and financial side for Copeland Lumber Yards and in the accounting/auditing division of Price Waterhouse. He has a B.A. from Lewis & Clark College and is a CPA.

#### **Anna Baum. La Grande**

Anna Baum is a CPA who has worked primarily as the office manager/accountant for her husband's law practice. She also has a private consulting firm where she provides investment and estate planning, tax planning, and tax preparation advice. She is a member of the Grande Ronde Hospital Board of Directors and the LaGrande Rotary Club where she served in leadership positions, including as president. She has a number of licenses including RIA, Series 7, and is a Certified Professional Financial Specialist.

#### **Attachments:**

Resumes of the four candidates listed above  
List of all applicants

## Molly Jo Mullen



Direct | 503.595.7802

Email | [mullen@bodyfeltmount.com](mailto:mullen@bodyfeltmount.com)

Website | [www.bodyfeltmount.com](http://www.bodyfeltmount.com)



### Introduction

Molly Jo Mullen was raised overseas and in southern Oregon, where her family has lived for generations. The daughter of a visual artist and a history professor, she learned to value the benefits of a free, open and democratic society while growing up in Africa. This early recognition of the importance of free speech and the rule of law led her to the University of Oregon, where she met her husband in Russian class. She then continued on to law school in San Francisco. Molly Jo is an active participant in local issues and spends much of her time championing the development of ethical, responsive and caring young attorneys who will live up to the high standards of the profession. She devotes her time to championing women and girls' athletic programs, including education and enforcement of Title IX. Molly Jo finds it an honor and a privilege to work with individuals and businesses through difficult legal struggles and life events. After 25 years as a trial attorney, Molly Jo is excited to transition into full time work as a neutral and welcomes the opportunity to assist parties in a new capacity.

### Practice & Experience

Molly Jo is a partner with Bodyfelt Mount LLP. She joined the firm as an associate in 1995 and became a partner in 2000. From 1991 to 1995, Molly Jo gained extensive trial experience as a staff attorney with Multnomah Defenders, Inc., as a criminal defense lawyer.

Molly Jo handles cases in the areas of employment, medical malpractice, products liability and general insurance defense. She has tried more than 75 cases to juries since beginning practice in 1991. Those jury trials range from minor auto accidents to multi-million-dollar professional negligence claims. Both Molly Jo and the firm are AV rated by Martindale-Hubbell.

## Molly Jo Mullen



*continued*

### Admitted to Practice

Oregon

U.S. District Court, District of Oregon

U.S. Ninth Circuit Court of Appeals

### Education

J.D. University of San Francisco School of Law, 1991

B.A. (History/Central Russian & East European Studies), University of Oregon, 1988

### Professional & Community Activities

American Bar Association

Federal Bar Association

Oregon Bar Association

Multnomah Bar Association

Oregon Mediation Association

Oregon Women Lawyers

Molly Jo is a member of the Multnomah County Arbitration Commission, as well as a frequent contributor and speaker for the Oregon Law Institute, Oregon State Bar and Oregon Association of Defense Counsel on topics primarily related to trial practice. She served on the Oregon State Bar Products Liability Executive Committee, Oregon Association of Defense Executive Committee, Oregon Women Lawyers' Queen's Bench, and Multnomah Bar Association Legal Services to the Poor Committee. Molly Jo is on the arbitration panel for Multnomah, Washington, Jackson and Columbia Counties. She serves as a volunteer mediator for Columbia and Washington Counties and is an approved mediator with the U.S. District Court of Oregon. Molly Jo is a certified mediator with the Oregon Patient Safety Commission, handling early resolution of adverse medical events. Molly Jo is also appointed to represent children in family law custody issues pro-bono through the Multnomah County Court system.

References are available upon request.



*continued*

### Representative Trial Experience

- Employment/Disability Discrimination, U.S. District Court, Medford, Oregon
- Commercial/Product liability, breach of contract trial in U.S. District Court, Eugene, Oregon
- Negligence/Premises liability trial in Circuit Court, Portland, Oregon
- Child custody dispute, appointed pro bono attorney for child in Circuit Court, Portland, Oregon
- Employment/Sexual battery trial in Circuit Court, Portland, Oregon
- Medical negligence trial in Circuit Court, Pendleton, Oregon
- Copyright/Trademark infringement defense, U.S. District Court, Portland, Oregon
- Medical negligence trial in Circuit Court, Baker, Oregon
- Negligence/Auto liability claim, Circuit Court, Portland, Oregon
- Product liability trial in Circuit Court, Bend, Oregon
- Attempted murder trial in Multnomah County Juvenile Court, Portland, Oregon
- Termination of parental rights trial in Multnomah County Circuit Court, Portland, Oregon
- Recovery of environmental cleanup costs trial against Clackamas County, Oregon City, Oregon
- Trespass/Encroachment trial in Circuit Court, Jackson County, Medford, Oregon

In addition to the above trials, Molly Jo has resolved numerous high-profile, high-exposure and multi-party cases through the use of alternative dispute resolution and mediation, as well as informal negotiation with opposing counsel.

### Mediation / Arbitration

Molly Jo has mediated and arbitrated over 100 cases as a neutral. She has over 200 hours of specialized mediation training and takes advantage of on-going training opportunities in dispute resolution.

References are available upon request.

# RONALD L. ROOME

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2439 NW 1<sup>st</sup> Street  
Bend, OR 97701  
RonRoome@bendbroadband.com  
541-410-0480 (Mobile)



## **LEGAL EMPLOYMENT**

- **Ronald L. Roome Arbitration & Mediation, Bend, OR – February 2013 to present**  
Attorney Arbitrator (private Judge) and Mediator in a wide variety of civil litigation cases.
- **Karnopp Petersen LLP, Bend, OR – July 1988 to February 2013**  
Attorney and Partner, very active in comprehensive civil litigation practice, including contracts, personal injury, employment, insurance, property, estates, wills and trusts, consumer, CC&Rs, and a wide variety of other general civil litigation cases. Over 25 jury trials.
- **Bledsoe, Cathcart, Boyd, Elliott & Curfman, San Francisco, CA – 1982 to 1984**  
Attorney, general civil litigation and insurance defense cases.

## **EDUCATION**

**Law School:** University of California, Hastings College of Law, San Francisco (J.D. 1982)

**Undergraduate:** California State University, Sacramento (B.A. Government, 1979)

## **BAR MEMBERSHIP**

**State Bar of Oregon** – 1988 to present (Bar Number 880976)

**State Bar of California** – 1982 to present (Bar Number 104843)

## **COURT ADMISSION**

- Supreme Court of the State of Oregon – 1988 to present
- United States District Court, District of Oregon – 1989 to present
- Supreme Court of the State of California – 1982 to present
- United States District Court, Northern District of California – 1982 to present
- United States District Court, Eastern District of California – 1983 to present
- United States Court of Appeals for the Ninth Circuit – 1983 to present

## **ACTIVITIES**

- City of Bend, Municipal Judge pro tempore – 2013 to present
- Oregon State Bar Disciplinary Board, Trial Judge – 2007 to present
- Oregon Liquor Control Board, Commissioner (appointed by Governor Kulongoski) – 2009 to 2012

- Deschutes County Circuit Court Arbitration Panel – 1995 to present
- J. R. Campbell Inns of Court – current member and Past President (twice)
- Deschutes County Bar Association – current member and Past President
- Pro tem Judicial Selection Committee, 11<sup>th</sup> and 22<sup>nd</sup> Judicial Districts – current member and Past Chair
- Oregon State Bar Fee Arbitration Program – Fee Arbitrator (2007 to present)
- Oregon State Bar Fee Mediation Program – Fee Mediator (2007 to present)
- Oregon State Bar Mentoring Panel – (2011 to present)
- Oregon Trial Lawyers Association – past member
- Oregon Association of Defense Counsel – past member
- Oregon State Bar, Procedure and Practice Committee – past member

## **REFERENCES**

- All sitting Deschutes County Circuit Court Judges
- Retired Deschutes County Circuit Court Judge Michael C. Sullivan
- Retired Deschutes County Circuit Court Judge Stephen N. Tikin
- Honorable United States Federal Magistrate Judge Dennis J. Hubel

## Tom Newhouse Bio:

Tom has over 30 years of accounting, financial and executive management experience. Currently Tom is the Chief Operating Officer (COO) of PayLess Drug, an institutional pharmacy that serves over 10,000 customers from 5 locations in Oregon, Washington and California (annual sales ~\$80 million). Tom joined PayLess Drug in 2002 as the CFO and assumed the COO position in 2005. He served as the CEO from 2009 – 2013 and was instrumental in the sale of PayLess in 2012 to Moda Health. In mid 2013 the PayLess subsidiary merged with Signature Pharmacy and Tom assumed his current position as the COO.

Prior to joining PayLess, Tom spent nine years in senior management as Controller and CIO for Copeland Lumber Yards, Inc. Copeland was a locally owned corporation with annual sales of \$200 million from 68 retail locations in five western states. Tom was a key member of Copeland's Executive Committee that successfully sold the company to several entities.

Prior to joining Copeland, Tom spent over five years in the accounting/auditing division of PriceWaterhouse where he earned his CPA certification in 1989.

He holds a BA degree in Economics and Business Administration from Lewis and Clark College.

**ANNA L. BAUM**

2005 Linda Lane • La Grande, Oregon 97850  
[annabaumc@gmail.com](mailto:annabaumc@gmail.com) • 541-805-9370

SENT VIA EMAIL: carolb@osbpfl.org

May 5, 2015

Oregon State Bar  
Professional Liability Fund  
Attention: Carolyn  
Re: Public Member – Professional Liability Fund Board of Directors

Dear Carolyn:

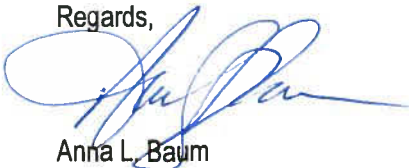
Enclosed is my resume for consideration as a public member for the Professional Liability Fund (PLF) Board of Directors. I have highlighted the most current and pertinent information for your review. My first job was legal secretary, responsible for preparation of all documents, maintaining the filing system, creating form notebooks and overseeing the administration of the Trust account. Upon my husband's graduation from law school, I assisted with the establishment of his office and participated in all aspects of running a law practice. With the establishment of the PLF in the late 70's, we utilized the guidelines to keep the office running smoothly, efficiently and gained an appreciation for the service provided by the PLF from the information available to the seminars provided by Dee Crocker.

After raising my four children, and completing my college degree, I returned to the work force as a CPA. I worked for a small accounting firm doing bookkeeping and preparing taxes. After receiving my license, I then prepared for the securities examination and passed the Series 7 and State exam and transitioned to the financial industry. Shortly after receiving my license, I then moved from the commission side of the securities business to fee only. Fee only has allowed me to move from working for a commission to working with the client in regards to their investments for tax and estate planning purposes. My specialization is in stocks, bonds and mutual funds. I remain passionate in helping people understand how their money works, grows and taking ownership of their investments.

Over the years through the transitions made in my husband's office, I have found myself returning to work in various capacities specializing in estate and trust planning, business and real estate transactions to maintaining the accounting, billing and trust accounting aspects. Being from Eastern Oregon, I feel I would bring not only my experience but the flavor of the small town attorney practice to supplement the fellow members of the Board. Due to the limited number of attorneys that can be supported by the smaller population we continually, find conflicts of interest and ethics and believe they may be more prevalent than in the larger metropolitan area. In light of this higher incidence we practice with a heightened awareness for these potential conflicts.

I look forward to hearing from you, contributing and giving back my experience to the Professional Liability Fund Board of Directors. Thank you for your consideration.

Regards,



Anna L. Baum

enclosure



## **ANNA L. BAUM**

2005 Linda Lane • La Grande, Oregon 97850  
[annabaumc@gmail.com](mailto:annabaumc@gmail.com) • 541-805-9370

### **Professional Profile:**

**Registered Investment Advisor (RIA)**, since 1998  
Licensed through Securities Exchange Commission and State of Oregon  
Securities Division

**Certified Public Account (CPA)**, since 1995  
Member of The American Institute of CPAs (AICPA) and The Oregon Society of  
CPAs (ORCPA)

**Series 7 License** (General Securities Representative Qualification), since 1995  
License with State of Oregon Securities Division

**Personal Financial Specialist (PFS)**, an AICPA certification, since 2001

**Oregon Teaching Certificate**, from 1990 to 2000

### **Professional Achievements:**

**Grande Ronde Hospital Board of Directors**, 2000 to 2008  
Board Secretary, 2004 to 2006  
Chair of Audit and Compensation Committees  
Member of Grande Ronde Hospital Foundation

**La Grande Rotary Club**, 1995 to 2014  
President, 2005 to 2006  
Club Treasurer, 2001 to 2005  
Board Member, 1998 to 2006

**Northeast Oregon Heritage Foundation**, 1998 to 2008  
Oregon Community Foundation Board and Fund Advisor

**Meyer Foundation Fund Advisor**, 2006 to 2008

**City of La Grande Finance Committee**, 1990 to 1995

### **Work Experience:**

**Baum Smith LLC**, La Grande, Oregon, 2010 to current  
**Paralegal and Chief Financial Officer**  
Trust and Estate Planning, Business and Real Property Transaction,  
Bookkeeping, Billing and Lawyer Trust Account

**Anna Baum Consulting**, La Grande, Oregon, 1995 to Current  
**Financial Consultant and CPA, RIA**  
Investment and Estate Planning, Tax Planning, Tax Preparation and  
Bookkeeping

**Adams Hess & Moore Co.**, Portland, Oregon, 1995 to 1998  
Branch Manager, La Grande, Oregon Office

## **ANNA L. BAUM**

2005 Linda Lane • La Grande, Oregon 97850  
[annabaumc@gmail.com](mailto:annabaumc@gmail.com) • 541-805-9370

### **Work Experience:**

**Bingenheimer & Company**, La Grande, Oregon, 1992 to 1995  
Staff Accountant, Tax Preparation

**Mautz, Baum & O'Hanlon**, La Grande, Oregon, 1990 to 1993  
Paralegal and Bookkeeping, Responsible for Trust, Estates Business and Corporation Transaction

**La Grande School District**, La Grande, Oregon, 1989 to 1992  
Substitute Teacher for Secondary Long-term Positions

**David C. Baum, Jr.**, La Grande, Oregon, 1975 to 1980  
Legal Secretary

**David C. Baum, Sr.**, La Grande, Oregon, 1975 to 1977  
Investment Assistant

**Oregon Real Estate Division**, Salem, Oregon, 1974 to 1975  
Secretary to Deputy Real Estate Commissioner

**Ralph W. G. Wyckoff**, Salem, Oregon, 1972 to 1974  
Legal Secretary

### **Education:**

**Bachelor of Science**, Graduated 1979  
**Eastern Oregon University**, La Grande, Oregon  
Business/Economics, Specialization Accounting  
Vocational Teaching Endorsement and Advanced Math

**Associate of Science**, Graduated 1972  
**Chemeketa Community College**, Salem, Oregon  
Business and Secretarial

### **References:**

Honorable Russell B. West  
1008 K Ave.  
La Grande, OR 97850  
541-962-9500

W. Eugene Hallman  
104 SE 5<sup>th</sup> St.  
Pendleton, OR 97801  
541-276-3857

Honorable Brian Dretke  
1008 K. Ave.  
La Grande, OR 97850  
541-962-9500

Stephen Piucci  
900 SW 13<sup>th</sup> Ave, #200  
Portland, OR 97205  
503-228-7385

**PLF Board of Directors – Applications  
Term Beginning January 1, 2016**

**Lawyer Applicants**

| Name/Bar Number  | Location    |
|--|-------------|
| Aldrich, Spencer S. - #092699                            | Portland    |
| Anderly, Cameron - #121998                               | Portland    |
| Beckfield, John H. - #902040<br><i>Applied via OSB</i>   | Salem       |
| Bofferding, Todd - #883720<br><i>Applied via OSB</i>     | Hood River  |
| Cauble, Chris - #962374<br><i>Applied via OSB</i>        | Grants Pass |
| Donnelly-Cole, Damien - #063135                          | Portland    |
| Ehlers, Patrick J. - #041186<br><i>Applied via OSB</i>   | Portland    |
| Fisher, Ann - #840459                                    | Beaverton   |
| Ford, Robert A. - #741008                                | Springfield |
| Goodwin, Jeffrey - #123269<br><i>Email inquiry only.</i> | Sweet Home  |
| Gouge, Linda K. - #920672<br><i>Applied via OSB</i>      | The Dalles  |
| Griffin, Anthony - #112574<br><i>Applied via OSB</i>     | Roseburg    |

|  |                       |
|--|-----------------------|
| Hendry, James W. - #832350                               | Portland              |
| Hittle, David - #741427                                  | Salem                 |
| Horner, Hon. William M. - #690814                        | Monmouth              |
| Jones, Tamara R. - #973868                               | Depoe Bay/Lake Oswego |
| King, Jaimee R. - #146042 (1999 grad.)                   | Portland              |
| Kullen, Tony - #090218<br><i>Applied via OSB</i>         | Portland              |
| Livermore, Megan - #054789<br><i>Email inquiry only.</i> | Eugene                |
| McConnell, Kevin - #022360                               | Medford               |
| McGrath, Michael T. - #013445<br><i>Applied via OSB</i>  | Portland              |
| Mullen, Molly Jo - #914969                               | Portland              |
| Olson, Kristin - #031333                                 | Portland              |
| Olson, Per - #933863                                     | Happy Valley          |
| Petersen, Agnes - #600678<br><i>Phone inquiry only.</i>  | St. Helens            |
| Pugh, Joseph - #961067                                   | Portland              |
| Rauch, Mark - #862637                                    | Silverton             |
| Ray, Traci - #074080                                     | Portland              |

|  |                 |
|--|-----------------|
| Riggs, Hon. Richard W. - #681408<br><i>Email inquiry only.</i> | Wilsonville     |
| Roome, Ronald L. - #880976                                     | Bend            |
| Rose, Rachel A. Yeats - #122292                                | Portland        |
| Schanz, Dan R. - #961114                                       | Salem           |
| Squires, Wendy - #794028                                       | Portland        |
| Sugerman, David F. - #862984<br><i>Phone inquiry only.</i>     | Portland        |
| Upton, Hon. Suzanne - #901287                                  | Hillsboro       |
| Welsh, Robert J. - #115493<br><i>Applied via OSB</i>           | Corvallis       |
| Werner, Peter - #091722  | Bend            |
| Whitlock, Richard - #773884                                    | Medford         |
| Wiles, David B. - #901359                                      | Portland        |
| Wilkinson, Kate A. - #001705                                   | Salem           |
| Yanchar, Nicholas - #121523<br><i>Applied via OSB</i>          | Portland        |
| <b>Public Applicants</b>                                       |                 |
| <b>Name</b>  | <b>Location</b> |
| Baum, Anna   | La Grande       |

|                       |           |
|-----------------------|-----------|
| Billman-Mann, Jenifer | Salem     |
| Latham, Robert P.     | Corvallis |
| Levine, Jonathan      | Portland  |
| Newhouse, Tom         | Tigard    |
| Solomon, Richard      | Portland  |

## MEMORANDUM

To: BOG Appointments Committee

From: Charles Schulz, Oregon State Bar Admissions Director

Date: September 2, 2015

Re: 2016 Board of Bar Examiners Appointments

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The Board of Bar Examiners (BBX) met on August 27, 2015, to discuss potential applicants for the 2015-2018 BBX terms (attorney members) and the 2015-2016 BBX terms (public members). Under the new bylaws applicable to the BBX, the BBX solicits input from the OSB BOG prior to submitting its recommendations to the Oregon Supreme Court.

Each year four active members of the Oregon State Bar are appointed for three-year terms and two nonlawyer members are appointed for terms of one year. All board terms commence on October 1.

Article 28.2 of the Oregon State Bar Bylaws provides that:

The bar and the BBX will recruit candidates for appointment to the BBX and for appointment as co-graders. The BBX will solicit input from the Board of Governors before selecting co-graders and nominating candidates for appointment to the BBX.

Article 28.1 of the Oregon State Bar Bylaws provides that:

The BBX's responsibilities include: investigating applicants' character and fitness, developing a bar examination, determining the manner of examination, determining appropriate accommodations for applicants, grading the bar examinations and setting standards for bar examination passage. The BBX may appoint co-graders to assist with the grading of examinations. The BBX may also recommend to the Court rules governing the qualifications, requirements and procedures for admission to the bar, by examination or otherwise, for law student appearance, and other subjects relevant to the responsibilities of the BBX.

Because of the nature of the work performed by the BBX, it is desirable to select new BBX members from among those individuals who have experience either as co-graders or as members of the BBX. In addition to assisting BBX members in grading the exam, co-graders assist in the drafting of bar exam questions. Since not all of the subjects used by the National Conference of Bar Examiners can be tested on the Oregon bar examination, in any given exam the BBX may be required to develop up to three essay questions. Question writing is a learned skill that is difficult to master quickly and BBX values having members with experience with the exam writing and grading process. Using a flawed question would compromise the statistical validity and reliability of the test and could damage the integrity of the Oregon bar examination. By using co-graders and developing their skills as question drafters, the BBX is able identify skilled potential members whose membership on the BBX will insure the continued integrity and legitimacy of the Oregon bar exam.

The other major aspect of the work of the BBX is determining whether each applicant has the requisite character and fitness to become a member of the Bar. BBX members review applicant files, conduct preliminary interviews, and serve on hearing panels. Because there is a significant learning curve to mastering the law and procedure associated with bar admissions, the BBX tries to retain members over multiple terms. Experienced BBX members promote continuity in decision-making and serve as mentors to co-graders who are learning the skills associated with grading and question writing. Finally, the BBX must make accommodations decision for applicants and we try to ensure that at least one BBX member has substantive knowledge in this area.

The BBX seeks to obtain a diverse group of individuals to serve on the board. Diversity includes a lawyer's practice area, whether the lawyer is a member of firm, solo practitioner, in-house or government lawyer, geographic, gender and racial/ethnic diversity.

This year, 94 attorneys expressed an interest in serving as co-graders or BBX members through the Oregon State Bar Volunteer Preference Form. Thirteen attorneys and two non-attorneys were recruited by the BBX through direct communication and through service on the BBX or as BBX co-graders. The BBX looks forward to working with its BOG liaison and the BOG to review the list attorneys who have expressed an interest in serving on the BBX to ensure that co-graders and BBX members continue to reflect the broad diversity evidenced throughout the bar's membership.

This is the first year the BBX has worked under this framework for appointing members. In the past its recommendation went directly to the Supreme Court. The BBX wishes to express its thanks to the BOG for input on its proposed members and the process. Given the importance of selecting co-graders as the first step in becoming BBX members, the BBX looks forward to working closely with its BOG liaison on the selection of co-graders for the summer 2016 exam which it intends to submit to the BOG later this year.

The BBX is submitting the following individuals to the BOG for input.

**Attorney Members:**

Angela Franco Lucero – OSB# 033180  
Lake Oswego  
Small Firm – Kranovich & Lucero LLC

Ms. Lucero has served as a co-grader on four bar examinations and comes highly recommended by existing BBX members. She has helped draft and grade essay questions, and she has graded the Multistate Performance Test. Ms. Lucero has actively contributed to the OSB by serving as a HOD Delegate and as a member of the OSB Mentoring Pool. Ms. Lucero has a long history of service as a member of the Diversity Section and the Litigation Section, which will be beneficial to the BBX when analyzing testing accommodation requests under the ADA, and when evaluating character and fitness matters.



Jeffrey Alan Howes – OSB# 953047  
Portland  
Government Attorney

Mr. Howes is a current member of the BBX. As the First Assistant to the District Attorney, his experience has proven valuable as a member of the Character and Fitness Committee. Mr. Howes provides crucial input to the BBX concerning criminal matters as they relate to character and fitness. Mr. Howes has been active on the BBX's Testing Accommodations Committee since before the ADA Amendment Act took effect in 2009 and is the current chair of that committee. Mr. Howes is active on two pending character and fitness matters. Mr. Howes is also on the UBE committee and has been working on consideration of the Uniform Bar Exam since it was proposed by the National conference of Bar Examiners in 2009.

Stephanie Tuttle – OSB # 934468  
Salem  
Government Attorney

Ms. Tuttle is a current member of the BBX. Her current position in the Criminal Justice Division of the DOJ gives her a great deal of perspective on character and fitness matters facing the BBX. Ms. Tuttle is currently a member of the Character and Fitness Committee and she is the Presiding Member of a Hearing Panel that is working on a current Contested Admission matter. Ms. Tuttle is also active on the Uniform Bar Exam Committee. The UBE has been under consideration for many years and Ms. Tuttle will be a key person in developing a new rule should the UBE be adopted in Oregon. Ms. Tuttle has been selected to serve as the BBX Chair for 2015-2016 should she be reappointed for another term.

Nicole L Robbins – OSB# 034330  
West Linn  
Solo Practitioner

Ms. Robbins is a current member of the BBX. As a solo practitioner she brings a perspective on the challenges facing the independent lawyer not shared by her colleagues working as government attorneys and those in large firms. Her experience in Family law is very useful when evaluating domestic issues in the character and fitness process. Ms. Robbins is currently finishing her third year of BBX membership, and the BBX would like to benefit from her experience for another term. Ms. Robbins has been selected to serve as the BBX Vice-Chair for the 2015-2016 should she be reappointed for another term.

**Public (non-attorney) Members:**

Dr. Randall (Randy) Green, Ph.D.  
Mid-Valley Counseling Center  
Salem, Oregon

Dr. Green is a psychologist in private practice. He has served on the BBX for the past ten years. Due to the unexpected resignation of public member Dr. Shane Hayden, Dr. Green has been involved on all character and fitness matters and all BBX hearings over the past year. Dr. Green has been approached by the BBX to serve an additional one-year term while Dr. Hayden's replacement, Dr. Richard Kolbell, becomes familiar with the BBX processes.

Dr. Richard M Kolbell, Ph. D.  
Private Practice  
Portland

Dr. Kolbell is currently serving on the BBX as an interim replacement for former public member Dr. Shane Hayden. Dr. Kolbell's extensive experience in Administrative and Civil Forensic Psychology has already proven to be very useful to the BBX. Dr. Kolbell has conducted many Independent Medical Evaluations and he will be a valuable contributor to BBX both on character and fitness matter and when evaluating medical reports from persons requesting accommodations under the ADA.



# FINANCIAL STATEMENTS SUMMARY

July 31, 2015

## Narrative Summary

July's Net Operating Expense (NOE) makes the current financial statements cause for concern.

The July NOE (expenses exceeded revenue) was \$247,666 leaving the year-to-date Net Operating Revenue at only \$164,224 indicating a challenge to reach the \$92,271 budget at year end. However, July is one of the two months in the year where there are three pay roll periods, so an approximately \$260,000 more in personnel costs are added to the July statements. Without that extra charge July would have been a break-even month.

## Executive Summary

|  | Actual<br>7/31/2015 | Seasonal<br>Budget<br>7/31/2015 | Budget<br>Variance | % of<br>Budget | Actual<br>7/30/2014 |
|--|---------------------|---------------------------------|--------------------|----------------|---------------------|
| <b>Revenue</b>                             |                     |                                 |                    |                |                     |
| Member Fees                                | \$ 4,200,461        | \$4,151,142                     | \$49,319           | 1.2%           | \$ 4,143,114        |
| Program Fees                               | 2,134,838           | 2,248,623                       | (113,785)          | -5.1%          | 2,235,324           |
| Other Income                               | 186,375             | 205,477                         | (19,102)           | -9.3%          | 203,355             |
| <b>Total Revenue</b>                       | <b>6,521,674</b>    | <b>6,605,241</b>                | <b>(83,567)</b>    | <b>-1.3%</b>   | <b>6,581,793</b>    |
| <b>Expenses</b>                            |                     |                                 |                    |                |                     |
| Salaries & Benefits                        | 4,909,882           | 4,650,092                       | 259,790            | 5.6%           | 4,623,074           |
| Direct Program, G & A                      | 1,447,568           | 1,465,440                       | (17,872)           | -1.2%          | 1,321,154           |
| Contingency                                | -                   | 14,583                          | (14,583)           | -100.0%        | 0                   |
| <b>Total Expense</b>                       | <b>6,357,450</b>    | <b>6,130,115</b>                | <b>227,335</b>     | <b>3.7%</b>    | <b>5,944,228</b>    |
| <b>Net Operating Rev (Exp)</b>             | <b>164,224</b>      | <b>\$ 475,126</b>               | <b>(310,902)</b>   |                | <b>637,565</b>      |
| Fanno Creek Place                          | (381,805)           | (396,246)                       |                    |                | (397,574)           |
| Net Rev Bef Mkt Adj                        | (217,581)           | 78,880                          |                    |                | 239,991             |
| Unrealized Investment<br>Gains /(Losses)   | (75,318)            |                                 |                    |                | 187,074             |
| Realized Investment<br>Gains/(Losses)      | 54,153              |                                 |                    |                | (24,255)            |
| Publ Inventory<br>Increase/Decrease (COGS) | (38,906)            |                                 |                    |                | (9,474)             |
| <b>Net Revenue</b>                         | <b>\$ (277,652)</b> | <b>\$ 78,880</b>                |                    |                | <b>\$ 393,336</b>   |

Negative  
Budget  
Variance

## ≡ Notes on Selected Programs

### Admissions

The July statement is deceiving since most of revenue is collected and many expenses are still outstanding. The year should end with a net revenue, but it will be smaller than the past few years.

The smaller net revenue will be attributable to only 398 candidates sitting for the July exam – the lowest number since the 1980's.

### CLE Seminars

Revenue lags behind last year by 19% and is only 42% of budget indicating a significant net expense for the year.

A reason for the revenue fall-off may be explained by the gain in MCLE (see below) which is accrediting more non-OSB, short-length, on line events.

### Legal Publications

The statements look very negative year-to-date. However, that will change in late August/early September when the *Real Estate Desk Book* will be available for purchase.

Pre-orders on the 4,500-5,000 page, 6-volume publication already are \$117,000. The budget is \$117,325, so this book will well exceed its budget.

### MCLE

Revenue from two sources of MCLE are up considerably from a year ago.

**Sponsorship Fees** are up 9.2% simply because MCLE has accredited that many more programs than a year ago.

**Late Fees** are 16% more than a year ago and have already surpassed the 2015 budget by \$5,800.

### AMS

Through July, the bar has expended \$158,788 (including legal fees for contract preparation). In the next 1-2 months the bar will incur the biggest expenses for the licenses and install of some of the modules.

### LAWYER REFERRAL

Revenue from the referral fee is at \$374,081. If that rate continues through the rest of 2015, the year-end revenue will be \$641,000 – about \$114,000 more than 2014.

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# OREGON STATE BAR

## Governance and Strategic Planning Agenda

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From: Amber Hollister, Deputy General Counsel  
Meeting Date: September 11, 2015  
Re: Amendments to Fee Arbitration Rules

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### **Action Recommended**

Consider the proposed revisions to the bar's Fee Arbitration Rules. The revisions re-name the Fee Arbitration Rules as the Fee Dispute Resolution Rules, and create a permanent Fee Mediation Program at the bar.

### **Background and Discussion**

In 2011, the Board of Governors approved the recommendations of the Fee Arbitration Task Force. Based on those recommendations, the bar instituted a mediation pilot project which allows Oregon attorneys and clients to mediate fee disputes in advance of arbitration.

The mediation pilot project has been in place since early 2012, and has been well-received by members and the public. Since its inception, 36 fee mediations have been completed and 40 petitioners have asked for mediation instead of arbitration, but have not gone to hearing.

Based on positive feedback, General Counsel recommends the Board of Governors make the fee mediation program a permanent offering. In order to institutionalize the fee mediation program, General Counsel recommends that the bar adopt the attached Fee Dispute Resolution Rules.

These proposed rules have been reviewed by the Fee Arbitration Advisory Committee as well as the Executive Committee of the Alternative Dispute Resolution Committee.

Attachments: Fee Arbitration Rules Redline and Clean versions

# Fee Dispute Resolution Rules

## Rules of the Oregon State Bar on Mediation and Arbitration of Fee Disputes *Effective \_\_\_\_\_ 2015*

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### **Section 1 Purpose**

**1.1** The purpose of these Rules is to provide a voluntary method to resolve fee disputes between active members of the Oregon State Bar maintaining offices in Oregon and their clients; between those members and other active members of the Oregon State Bar, and; between active members of a state bar other than Oregon and their clients who either are residents of the state of Oregon or have their principal place of business in Oregon. Parties who agree to participate in this program expressly waive the requirements of ORS 36.600 to 36.740 to the extent permitted by ORS 36.610 except as specifically provided herein.

### **Section 2 Mediation and Arbitration Panels; Advisory Committee**

**2.1** The Fee Dispute Resolution Administrator (“Administrator”) shall appoint attorney members to mediation panels in each board of governors region, from which mediators will be selected. The normal term of appointment shall be three years, and a mediation panelist may be reappointed to a further term. All mediation panelists shall be active or active pro bono members in good standing of the Oregon State Bar with a principal business office in the board of governors region of appointment.

**2.2** The Administrator shall appoint attorney and public members to arbitration panels in each board of governors region, from which arbitrators will be selected. The normal term of appointment shall be three years, and an arbitration panelist may be reappointed to a further term. All attorney panelists shall be active or active pro bono members in good standing of the Oregon State Bar with a principal business office in the board of governors region of appointment. All public panelists shall reside or maintain a principal business office in the board of governors region of appointment and shall be neither active nor inactive members of any bar.

**2.3** General Counsel shall appoint an advisory committee consisting of at least one attorney panel member from each of the board of governors regions. The advisory committee shall assist General Counsel and the Administrator with training and recruitment of arbitration and mediation panel members, provide guidance as needed in the interpretation and implementation of the fee dispute rules, and make recommendations to the board of governors for changes in the rules or program.

### **Section 3 Training**

**3.1** The Oregon State Bar will offer training opportunities to panelists regarding mediation and arbitration techniques and the application of RPC 1.5 in fee disputes.

**3.2** The Administrator may request information about panelists’ prior training and experience and may appoint panelists based on their related training and experience.

### **Section 4 Initiation of Proceedings**

**4.1** A mediation proceeding shall be initiated by the filing of a written petition and mediation agreement. The mediation agreement must be signed by one of the parties to the dispute and filed with General Counsel’s Office within 6 years of the completion of the legal services involved in the dispute.

**4.2** An arbitration proceeding shall be initiated by the filing of a written petition and arbitration agreement. The petition must be signed by one of the parties to the dispute and filed with General Counsel's Office within 6 years of the completion of the legal services involved in the dispute.

**4.3** Upon receipt of a petition and agreement(s) signed by the petitioning party, the Administrator shall forward a copy of the petition and the agreement(s) to the respondent named in the petition by regular first-class mail e-mail or facsimile or by such other method as may reasonably provide the respondent with actual notice of the initiation of proceedings. Any supporting documents submitted with the petition shall also be provided to the respondent. If the respondent desires to submit the dispute to mediation or arbitration the respondent shall sign the agreement(s) and return the agreement(s) to the Administrator within twenty-one (21) days of receipt. A twenty-one (21) day extension of time to sign and return the petition may be granted by the Administrator. Failure to sign and return the agreement within the specified time shall be deemed a rejection of the request to mediate or arbitrate.

**4.4** A lawyer who is retained by a client who was referred by the OSB Modest Means Program or OSB Lawyer Referral Program may not decline to arbitrate if such client files a petition for fee arbitration.

**4.5** If the respondent agrees to mediate or arbitrate, the Administrator shall notify the petitioner who shall, within twenty-one (21) days of the mailing of the notice, pay a filing fee of \$75 for claims of less than \$7500 and \$100 for claims of \$7500 or more. The filing fee may be waived at the discretion of the Administrator based on the submission of a statement of the petitioner's assets and liabilities reflecting inability to pay. The filing fee shall not be refunded, except on a showing satisfactory to General Counsel of extraordinary circumstances or hardship.

**4.6** If the request to mediate or arbitrate is rejected, the Administrator shall notify the petitioner of the rejection and of any stated reasons for the rejection.

**4.7** The petition, mediation agreement, arbitration agreement and statement of assets and liabilities shall be in the form prescribed by General Counsel, provided however, that mediation and arbitration agreements may be modified with the consent of both parties and the approval of General Counsel.

**4.8** After the parties have signed a mediation or arbitration agreement, if one party requests that a mediation or arbitration proceeding not continue, the Administrator shall dismiss the proceeding. A dismissed proceeding will be reopened only upon agreement of the parties or receipt of a copy of an order compelling arbitration pursuant to ORS 36.625.

## **Section 5 Amounts in Dispute**

**5.1** Any amount of fees or costs in controversy may be mediated or arbitrated. The Administrator may decline to mediate or arbitrate cases in which the amount in dispute is less than \$250.00.

**5.2** The sole issue to be determined in all fee dispute proceedings under these rules shall be whether the fees or costs charged for the services rendered were reasonable in light of the factors set forth in RPC 1.5.



## **Section 6 Selection of Mediators and Arbitrators**

**6.1** Each party to a mediation shall receive with the petition and mediation agreement a list of the members of the mediation panel from the board of governors region in which a lawyer to the dispute maintains his or her law office.

**6.2** Each party to an arbitration shall receive with the petition and arbitration agreement a list of the members of the arbitration panel in the board of governors region in which a lawyer to the dispute maintains his or her law office.

**6.3** Each party may challenge without cause, and thereby disqualify as mediators or arbitrators, not more than two panelists. Each party may also challenge any panelist for cause. Any challenge for cause must be made by written notice to the Administrator, shall include an explanation of why the party believes the party cannot have a fair and impartial hearing before the panelist, and shall be submitted with the required fee. Challenges for cause shall be determined by General Counsel, based on the reasons offered by the challenging party. Upon receipt of the agreement signed by both parties, the Administrator shall select the appropriate number of panelists from the list of unchallenged panelists to hear a particular dispute.

**6.4** All mediations shall be mediated by one lawyer panelist selected the board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give the parties notice of the mediator's appointment.

**6.5** Disputed amounts of less than \$10,000 shall be arbitrated by one lawyer panelist. Disputed amounts of \$10,000 or more shall be arbitrated by three panelists, including two lawyer arbitrators and one public arbitrator. If three (3) arbitrators are appointed, the Administrator shall appoint one lawyer arbitrator to serve as chairperson. The Administrator shall appoint panelists from the board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give notice of appointment to the parties of the appointment. Regardless of the amount in controversy, the parties may agree that one lawyer arbitrator hear and decide the dispute. If three arbitrators cannot be appointed in a fee dispute from the arbitration panel of the board of governors region in which a dispute involving \$7,500 or more is pending, the dispute shall be arbitrated by a single arbitrator. If, however, any party files a written objection with the Administrator within ten (10) days after receiving notice that a single arbitrator will be appointed under this subsection, two (2) additional arbitrators shall be appointed.

**6.6** Any change or addition in appointment of mediators or arbitrators shall be made by the Administrator. When necessary, the Administrator may appoint mediators or arbitrators from a region other than the board of governors region in which a lawyer to the dispute maintains his or her law office.

**6.7** Before accepting appointment, a mediator or arbitrator shall disclose to the parties and, if applicable, to the other arbitrators, any known facts that a reasonable person would consider likely to affect the impartiality of the mediator or arbitrator in the proceeding. Mediators and arbitrators have a continuing duty to disclose any such facts learned after appointment. After disclosure of facts required by this rule, the mediator or arbitrator may be appointed or continue to serve only if all parties to the proceeding consent; in the absence of consent by all parties, the Administrator

will appoint a replacement mediator or arbitrator and, if appropriate, extend the time for the hearing.

**6.8** In the absence of consent by all parties, no person appointed as a mediator may thereafter serve as an arbitrator for the same fee dispute.

### **Section 7 Mediation**

**7.1** The mediator shall arrange a mutually agreeable date, time and place for the mediation. The mediator shall provide notice of the mediation date, time and place to the parties and to the Administrator not less than 14 days before the mediation, unless the notice requirement is waived by the parties.

**7.2** The mediation shall be held within ninety (90) days of appointment of the mediator by the Administrator. Upon request of a party, or upon his or her own determination, the mediator may adjourn, continue or postpone the mediation as the mediator determines necessary.

**7.3** Any communications made during the course of mediation are confidential to the extent provided by law. ORS 36.220. Mediations are not public meetings; the mediator has the sole discretion to allow persons who are not parties to the mediation to attend the proceedings.

**7.4** If the parties reach a settlement in mediation, the mediator may draft a settlement agreement consistent with RPC 2.4 to memorialize the parties' agreement.

**7.5** At the conclusion of the mediation, the mediator shall notify the Administrator if the fee dispute was resolved. The mediator shall not provide a copy of the settlement agreement to the bar.

### **Section 8 Arbitration Hearing**

**8.1** The chairperson or sole arbitrator shall determine a convenient time and place for the arbitration hearing to be held. The chairperson or sole arbitrator shall provide written notice of the hearing date, time and place to the parties and to the Administrator not less than 14 days before the hearing. Notice may be provided by regular first class mail, e-mail, or facsimile or by such other method as may reasonably provide the parties with actual notice of the hearing. Appearance at the hearing waives the right to notice.

**8.2** The arbitration hearing shall be held within ninety (90) days after appointment of the arbitrator(s) by Administrator, subject to the authority granted in subsection 8.3.

**8.3** The arbitrator or chairperson may adjourn the hearing as necessary. Upon request of a party to the arbitration for good cause, or upon his or her own determination, the presiding arbitrator may postpone the hearing from time to time.

**8.4** Arbitrators shall have those powers conferred on them by ORS 36.675. The chairperson or the sole arbitrator shall preside at the hearing. The chairperson or the sole arbitrator may receive any evidence relevant to a determination under Rule 5.2, including evidence of the value of the lawyer's services rendered to the client. He or she shall be the judge of the relevance and materiality of the evidence offered and shall rule on questions of procedure. He or she shall exercise all powers relating to the conduct of the hearing, and conformity to legal rules of evidence

shall not be necessary. Arbitrators shall resolve all disputes using their professional judgment concerning the reasonableness of the charges made by the lawyer involved.

**8.5** The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration may be represented at his or her own expense by a lawyer at the hearing or at any stage of the arbitration.

**8.6** On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the chairperson or sole arbitrator may administer oaths to witnesses testifying at the hearing.

**8.7** Upon request of one party, and with consent of both parties, the panel or sole arbitrator may decide the dispute upon written statements of position and supporting documents submitted by each party, without personal attendance at the arbitration hearing. The chairperson or sole arbitrator may also allow a party to appear by telephone if, in the sole discretion of the chairperson or sole arbitrator, such appearance will not impair the ability of the arbitrator(s) to determine the matter. The party desiring to appear by telephone shall bear the expense thereof.

**8.8** If any party to an arbitration who has been notified of the date, time and place of the hearing but fails to appear, the chairperson or sole arbitrator may either postpone the hearing or proceed with the hearing and determine the controversy upon the evidence produced, notwithstanding such failure to appear.

**8.9** Any party may have the hearing reported at his or her own expense. In such event, any other party to the arbitration shall be entitled to a copy of the reporter's transcript of the testimony, at his or her own expense, and by arrangements made directly with the reporter. As used in this subsection, "reporter" may include an electronic reporting mechanism.

**8.10** If during the pendency of an arbitration hearing or decision the client files a malpractice suit against the lawyer, the arbitration proceedings shall be either stayed or dismissed, at the agreement of the parties. Unless both parties agree to stay the proceedings within 14 days of the arbitrator's receipt of a notice of the malpractice suit, the arbitration shall be dismissed.

### **Section 9 Arbitration Award**

**9.1** An arbitration award shall be rendered within thirty (30) days after the close of the hearing unless General Counsel, for good cause shown, grants an extension of time.

**9.2** The arbitration award shall be made by a majority where heard by three members, or by the sole arbitrator. The award shall be in writing and signed by the members concurring therein or by the sole arbitrator. The award shall state the basis for the panel's jurisdiction, the nature of the dispute, the amount of the award, if any, the terms of payment, if applicable, and an opinion regarding the reasons for the award. Awards shall be substantially in the form shown in Appendix A. An award that requires the payment of money shall be accompanied by a separate statement that contains the information required by ORS 18.042 for judgments that include money awards.

**9.3** Arbitrator(s) may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the fee dispute proceeding. An attorney shall not be awarded more than the amount for services

billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.

**9.4** The original award shall be forwarded to the Administrator, who shall mail certified copies of the award to each party to the arbitration. The Administrator shall retain the original award, together with the original fee dispute agreement. Additional certified copies of the agreement and award will be provided on request. The OSB file will be retained for six years after the award is rendered; thereafter it may be destroyed without notice to the parties.

**9.5** If a majority of the arbitrators cannot agree on an award, they shall so advise the Administrator within 30 days after the hearing. The Administrator shall resubmit the matter, de novo, to a new panel within thirty days.

**9.6** The arbitration award shall be binding on both parties, subject to the remedies provided for by ORS 36.615, 36.705 and 36.710. The award may be confirmed and a judgment entered thereon as provided in ORS 36.615, 36.700 and ORS 36.715.

**9.7** Upon request of a party and with the approval of General Counsel for good cause, or on General Counsel's own determination, the arbitrator(s) may be directed to modify or correct the award for any of the following reasons:

- a. there is an evident mathematical miscalculation or error in the description of persons, things or property in the award;
- b. the award is in improper form not affecting the merits of the decision;
- c. the arbitration panel or sole arbitrator has not made a final and definite award upon a matter submitted; or
- d. to clarify the award.

## **Section 10 Confidentiality**

**10.1** The resolution of a fee dispute through the Oregon State Bar Fee Dispute Resolution Program is a private, contract dispute resolution mechanism, and not the transaction of public business.

**10.2** Except as provided in paragraph 10.4 below, or as required by law or court order, all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the mediators or arbitrators, and any award rendered by the arbitrator(s), shall not be subject to public disclosure, unless all parties to an arbitration agree otherwise. The Oregon State Bar considers all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the mediators or arbitrators, to be submitted on the condition that they are kept confidential.

**10.3** Mediations and arbitration hearings are closed to the public, unless all parties agree otherwise. Witnesses who will offer testimony on behalf of a party may attend an arbitration hearing, subject to the chairperson's or sole arbitrator's discretion, for good cause shown, to exclude witnesses.

**10.4** Notwithstanding paragraphs 10.1, 10.2, and 10.3, lawyer mediators and arbitrators shall inform the Client Assistance Office when they know, based on information obtained during the course of an arbitration proceeding, that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

**10.5** Notwithstanding paragraphs 10.1, 10.2, and 10.3, and 10.4, all electronic and written records and other materials submitted to General Counsel's Office or to the mediators or arbitrators during the course of the proceeding, and any award rendered by the arbitrator(s), shall be made available to the Client Assistance Office and/or Disciplinary Counsel for the purpose of reviewing any alleged ethical violation in accordance with BR 2.5 and BR 2.6.

**10.6** Notwithstanding paragraphs 10.1, 10.2, 10.3 and 10.4, General Counsel's Office may disclose to the Client Assistance Office or to Disciplinary Counsel, upon the Client Assistance Office's or Disciplinary Counsel's request, whether a dispute resolution proceeding involving a particular lawyer is pending, the current status of the proceeding, and, at the conclusion of an arbitration proceeding, in whose favor the arbitration award was rendered.

**10.7** Notwithstanding paragraphs 10.1, 10.2 and 10.3, if any lawyer whose employment was secured through the Oregon State Bar Modest Means Program or Lawyer Referral Program refuses to participate in fee arbitration, the Administrator shall notify the administrator of such program(s).

**10.8** Mediators and parties who agree to participate in this program expressly waive the confidentiality provisions of ORS 36.222 to the extent necessary to allow disclosures pursuant to Rule 7.5, 10.4, 10.5 and 10.6.

### **Section 11 Immunity and Competency to Testify**

**11.1** Pursuant to ORS 36.660, arbitrators shall be immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity. All other provisions of ORS 36.660 shall apply to arbitrators participating in the Oregon State Bar dispute resolution program.

**Appendix A**

**Oregon State Bar  
Fee Arbitration**

|            |                     |
|------------|---------------------|
|            | ) Case No.          |
| Petitioner | )                   |
| v.         | ) Arbitration Award |
|            | )                   |
| Respondent | )                   |

**Jurisdiction**

**Nature of Dispute**

**Amount of Award**

**Opinion**

**Award Summary**

The arbitrator(s) find that the total amount of fees and costs that should have been charged in this matter is: \$

Of which the Client is found to have paid: \$

For a net amount due of: \$

Accordingly, the following award is made: \$

Client shall pay Attorney the sum of: \$

**(or)**

Attorney shall refund to Client the sum of: \$

**(or)**

Nothing further shall be paid by either attorney or client.

/Signature(s) of Arbitrator(s)

# Fee ~~Arbitration~~Dispute Resolution Rules

Rules of the Oregon State Bar on Mediation and Arbitration of Fee Disputes

Effective ~~February 2013~~ 2015

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## Section 1 -Purpose

1.1 The purpose of these Rules is to provide ~~for the arbitration of a~~ voluntary method to resolve fee disputes between active members of the Oregon State Bar maintaining offices in Oregon and their clients; between those members and other active members of the Oregon State Bar, and; between active members of a state bar other than Oregon and their clients who either are residents of the state of Oregon or have their principal place of business in Oregon. Parties who agree to participate in this program expressly waive the requirements of ORS 36.600 to 36.740 to the extent permitted by ORS 36.610 except as specifically provided herein.

## Section 2 ~~-Mediation and Arbitration Panels; Advisory Committee~~

2.1 ~~General Counsel shall~~The Fee Dispute Resolution Administrator (“Administrator”) shall appoint attorney members to ~~an arbitration panel~~ mediation panels in each board of governors region, from which ~~hearing panels~~ mediators will be selected. The normal term of appointment shall be three years, and a ~~panel member~~ mediation panelist may be reappointed to a further term. All ~~attorney panel members~~ mediation panelists shall be active or active pro bono members in good standing of the Oregon State Bar. ~~Public members with a principal business office in the board of governors region of appointment.~~

2.2 The Administrator shall appoint attorney and public members to arbitration panels in each board of governors region, from which arbitrators will be selected ~~from individuals who. The normal term of appointment shall be three years, and an arbitration panelist may be reappointed to a further term. All attorney panelists shall be active or active pro bono members in good standing of the Oregon State Bar with a principal business office in the board of governors region of appointment. All public panelists shall~~ reside or maintain a principal business office in the board of governors region of appointment and ~~who are~~ shall be neither active nor inactive members of any bar.

2.23 ~~General Counsel shall also~~ appoint an advisory committee consisting of at least one attorney panel member from each of the board of governors regions. The advisory committee shall assist General Counsel and the Administrator with training and recruitment of arbitration and mediation panel members, provide guidance as needed in the interpretation and implementation of the fee ~~arbitration dispute~~ rules, and make recommendations to the board of governors for changes in the rules or program.

## Section 3 ~~Initiation of Proceedings~~Training

~~3.13.1~~ The Oregon State Bar will offer training opportunities to panelists regarding mediation and arbitration techniques and the application of RPC 1.5 in fee disputes.

3.2 The Administrator may request information about panelists’ prior training and experience and may appoint panelists based on their related training and experience.

## Section 4 Initiation of Proceedings

4.1 A mediation proceeding shall be initiated by the filing of a written petition and mediation agreement. The mediation agreement must be signed by one of the parties to the dispute and filed

with General Counsel's Office within 6 years of the completion of the legal services involved in the dispute.

**4.2** An arbitration proceeding shall be initiated by the filing of a written petition and ~~an~~ arbitration agreement. The petition must be signed by one of the parties to the dispute and filed with General Counsel's Office within 6 years of the completion of the legal services involved in the dispute.

**4.3.2** Upon receipt of ~~the~~ petition and ~~arbitration~~ agreement(s) signed by the petitioning party, ~~General Counsel's Office~~ the Administrator shall forward a copy of the petition and the ~~original arbitration~~ agreement(s) to the respondent named in the petition by regular first-class mail e-mail or facsimile or by such other method as may reasonably provide the respondent with actual notice of the initiation of proceedings. Any supporting documents submitted with the petition shall also be provided to the respondent. If the respondent desires to submit the dispute to mediation or arbitration, the respondent shall sign the ~~original arbitration~~ agreement(s) and return ~~it~~ the agreement(s) to ~~General Counsel's Office~~ the Administrator within twenty-one (21) days ~~after of~~ receipt. A twenty-one (21) day extension of time to sign and return the petition may be granted by ~~General Counsel~~ the Administrator. Failure to sign and return the ~~arbitration~~ agreement within the specified time shall be deemed a rejection of ~~arbitration~~ the request to mediate or arbitrate.

**4.4** A lawyer who is retained by a client who was referred by the OSB Modest Means Program or OSB Lawyer Referral Program may not decline to arbitrate if such client files a petition for fee arbitration.

**3.34.5** If the respondent agrees to mediate or arbitrate, ~~General Counsel's Office~~ the Administrator shall notify the petitioner who shall, within twenty-one (21) days of the mailing of the notice, pay a filing fee of \$~~5075~~ for claims of less than -\$7500 and \$~~75100~~ for claims of -\$7500 or more. The filing fee may be waived at the discretion of ~~General Counsel~~ the Administrator based on the submission of a statement of the petitioner's assets and liabilities reflecting inability to pay. The filing fee shall not be refunded ~~if the dispute is settled prior to the issuance of an award or if the parties agree to withdrawal of the petition~~, except on a showing satisfactory to General ~~Counsel's Office~~ Counsel of extraordinary circumstances or hardship.

**3.4.6** If ~~arbitration~~ the request to mediate or arbitrate is rejected, ~~General Counsel's Office~~ the Administrator shall notify the petitioner of the rejection and of any stated reasons for the rejection.

**3.54.7** The petition, mediation agreement, arbitration agreement and statement of assets and liabilities shall be in the form prescribed by General Counsel, provided however, that ~~the agreement~~ mediation and arbitration agreements may be modified with the consent of both parties and the approval of General ~~Counsel's Office~~ Counsel.

**3.64.8** After the parties have signed ~~the a~~ mediation or arbitration agreement ~~to arbitrate~~, if one party requests that ~~the a~~ mediation or arbitration proceeding not continue, ~~General Counsel's Office~~ the Administrator shall dismiss the proceeding. A dismissed proceeding will be reopened only upon agreement of the parties or receipt of a copy of an order compelling arbitration pursuant to ORS 36.625.

## Section ~~45~~ Amounts in Dispute

~~45.1~~ Any amount of fees or costs in controversy may be mediated or arbitrated. The ~~arbitrator(s)~~ may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the arbitration proceeding. ~~General Counsel's Office~~Administrator may decline to mediate or arbitrate cases in which the amount in dispute is less than \$250.00.

~~45.2~~ The sole issue to be determined in all arbitration fee dispute proceedings under these rules shall be whether the fees or costs charged for the services rendered were reasonable in light of the factors set forth in RPC 1.5. ~~Arbitrators may receive any evidence relevant to a determination under this Rule, including evidence of the value of the lawyer's services rendered to the client. An attorney shall not be awarded more than the amount for services billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.~~

## Section ~~5-6~~ Selection of Mediators and Arbitrators

~~5.1~~ Each party to the dispute 6.1 Each party to a mediation shall receive with the petition and mediation agreement a list of the members of the mediation panel from the board of governors region in which a lawyer to the dispute maintains his or her law office.

6.2 Each party to an arbitration shall receive with the petition and arbitration agreement a list of the members of the arbitration panel having jurisdiction over the dispute. The arbitration panel having jurisdiction over a dispute shall be that of the board of governors region in which ~~the~~ lawyer to the dispute maintains his or her law office, ~~unless the parties agree that the matter should be referred to the panel of another board of governors region.~~

~~5.26.3~~ Each party may challenge without cause, and thereby disqualify as mediators or arbitrators, not more than two ~~members of the panel~~panelists. Each party may also challenge any ~~member of the panel~~panelist for cause. Any challenge for cause must be made by written notice to ~~General Counsel~~the Administrator, shall include an explanation of why the party believes the party cannot have a fair and impartial hearing before the ~~member~~panelist, and shall be submitted ~~along~~with the ~~Petition and Agreement~~required fee. Challenges for cause shall be determined by General Counsel, based on the reasons offered by the challenging party. Upon receipt of the agreement signed by both parties, the Administrator shall select the appropriate number of panelists from the list of unchallenged panelists to hear a particular dispute.

~~5.3~~ Upon receipt of 6.4 All mediations shall be mediated by one lawyer panelist selected the arbitration agreement signed by both board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give the parties, ~~General Counsel shall select the appropriate number of arbitrators from the list of unchallenged members~~ notice of the panel to hear a particular dispute. mediator's appointment.

6.5 Disputed amounts of less than ~~\$7,500~~10,000 shall be arbitrated by one ~~panel member~~lawyer panelist. Disputed amounts of ~~\$7,500~~10,000 or more shall be arbitrated by three ~~panel members~~ (subject to Rule 5.4). panelists, including two lawyer arbitrators and one public arbitrator. If three

(3) arbitrators are appointed, ~~General Counsel~~the Administrator shall appoint one lawyer ~~member~~arbitrator to serve as chairperson. ~~Notice of appointment shall be given by the General Counsel~~The Administrator shall appoint panelists from the board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give notice of appointment to the parties. ~~of the appointment.~~ Regardless of the amount in controversy, the parties may agree that one lawyer arbitrator hear and decide the dispute.

~~5.4~~ If three arbitrators cannot be appointed in a ~~particular case~~fee dispute from the arbitration panel of the board of governors region in which a dispute involving \$7,500 or more is pending, the dispute shall be arbitrated by a single arbitrator. If, however, any party files a written objection with ~~General Counsel~~the Administrator within ten (10) days after receiving notice that a single arbitrator will be appointed under this subsection, two (2) additional arbitrators shall be appointed, ~~under the procedures set out in subsection 5.5.~~

~~5.5.6.6~~ Any change or addition in appointment of mediators or arbitrators shall be made by ~~General Counsel. When appropriate,~~the Administrator. When necessary, the Administrator may appoint mediators or arbitrators ~~can be appointed by the General Counsel~~ from ~~the arbitration panel of a different region other than the~~ board of governors region. ~~When necessary, General Counsel may also select other arbitrators, provided that the~~ in which a lawyer ~~members are active members in good standing of the Oregon State Bar.~~ to the dispute maintains his or her law office.

~~5.6.7~~ Before accepting appointment, ~~an~~ a mediator or arbitrator shall disclose to the parties and, if applicable, to the other arbitrators, any known facts that a reasonable person would consider likely to affect the impartiality of the mediator or arbitrator in the proceeding. ~~Arbitrators~~Mediators and arbitrators have a continuing duty to disclose any such facts learned after appointment. After disclosure of facts required by this rule, the mediator or arbitrator may be appointed or continue to serve only if all parties to the proceeding consent; in the absence of consent by all parties, ~~General Counsel's Office~~the Administrator will appoint a replacement mediator or arbitrator and, if appropriate, extend the time for the hearing.

~~6.8~~ In the absence of consent by all parties, no person appointed as a mediator may thereafter serve as an arbitrator for the same fee dispute.

### **Section ~~6~~7 Mediation**

~~7.1~~ The mediator shall arrange a mutually agreeable date, time and place for the mediation. The mediator shall provide notice of the mediation date, time and place to the parties and to the Administrator not less than 14 days before the mediation, unless the notice requirement is waived by the parties.

~~7.2~~ The mediation shall be held within ninety (90) days of appointment of the mediator by the Administrator. Upon request of a party, or upon his or her own determination, the mediator may adjourn, continue or postpone the mediation as the mediator determines necessary.

~~7.3~~ Any communications made during the course of mediation are confidential to the extent provided by law. ORS 36.220. Mediations are not public meetings; the mediator has the sole discretion to allow persons who are not parties to the mediation to attend the proceedings.

7.4 If the parties reach a settlement in mediation, the mediator may draft a settlement agreement consistent with RPC 2.4 to memorialize the parties' agreement.

7.5 At the conclusion of the mediation, the mediator shall notify the Administrator if the fee dispute was resolved. The mediator shall not provide a copy of the settlement agreement to the bar.

### **Section 8 Arbitration Hearing**

~~68.1~~ The chairperson or sole arbitrator~~(s) appointed~~ shall determine a convenient time and place for the arbitration hearing to be held. The chairperson or ~~single~~sole arbitrator shall provide written notice of the hearing date, time and place to the parties and to ~~General Counsel's Office~~the Administrator not less than 14 days before the hearing. Notice may be provided by regular first class mail, e-mail, or facsimile or by such other method as may reasonably provide the parties with actual notice of the hearing. Appearance at the hearing waives the right to notice.

~~68.2~~ The arbitration hearing shall be held within ninety (90) days after appointment of the arbitrator(s) by ~~General Counsel~~Administrator, subject to the authority granted in subsection ~~68.3~~.

~~68.3~~ The arbitrator or chairperson may adjourn the hearing as necessary. Upon request of a party to the arbitration for good cause, or upon his or her own determination, the presiding arbitrator~~or chairperson~~ may postpone the hearing from time to time.

~~68.4~~ Arbitrators shall have those powers conferred on them by ORS 36.675. The chairperson or the sole arbitrator shall preside at the hearing. The chairperson or the sole arbitrator may receive any evidence relevant to a determination under Rule 5.2, including evidence of the value of the lawyer's services rendered to the client. He or she shall be the judge of the relevance and materiality of the evidence offered and shall rule on questions of procedure. He or she shall exercise all powers relating to the conduct of the hearing, and conformity to legal rules of evidence shall not be necessary. Arbitrators shall resolve all disputes using their professional judgment concerning the reasonableness of the charges made by the lawyer involved.

~~68.5~~ The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration may be represented at his or her own expense by a lawyer at the hearing or at any stage of the arbitration.

~~68.6~~ On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the chairperson or sole arbitrator may administer oaths to witnesses testifying at the hearing.

~~68.7~~ Upon request of one party, and with consent of both parties, the panel or sole arbitrator may decide the dispute upon written statements of position and supporting documents submitted by each party, without personal attendance at the arbitration hearing. The chairperson or sole arbitrator may also allow a party to appear by telephone if, in the sole discretion of the chairperson or sole arbitrator, such appearance will not impair the ability of the arbitrator(s) to determine the matter. The party desiring to appear by telephone shall bear the expense thereof.

~~68.8~~ If any party to an arbitration who has been notified of the date, time and place of the hearing but fails to appear, the chairperson or sole arbitrator may either postpone the hearing or proceed

with the hearing and determine the controversy upon the evidence produced, notwithstanding such failure to appear.

**68.9** Any party may have the hearing reported at his or her own expense. In such event, any other party to the arbitration shall be entitled to a copy of the reporter's transcript of the testimony, at his or her own expense, and by arrangements made directly with the reporter. As used in this subsection, "reporter" may include an electronic reporting mechanism.

**68.10** If during the pendency of an arbitration hearing or decision the client files a malpractice suit against the lawyer, the arbitration proceedings shall be either stayed or dismissed, at the agreement of the parties. Unless both parties agree to stay the proceedings within 14 days of the arbitrator's receipt of a notice of the malpractice suit, the arbitration shall be dismissed.

### Section ~~7-9~~ Arbitration Award

**79.1** An arbitration award shall be rendered within thirty (30) days after the close of the hearing unless General Counsel, for good cause shown, grants an extension of time.

**79.2** The arbitration award shall be made by a majority where heard by three members, or by the sole arbitrator. The award shall be in writing and signed by the members concurring therein or by the sole arbitrator. The award shall state the basis for the panel's jurisdiction, the nature of the dispute, the amount of the award, if any, the terms of payment, if applicable, and an opinion regarding the reasons for the award. Awards shall be substantially in the form shown in Appendix A. An award that requires the payment of money shall be accompanied by a separate statement that contains the information required by ORS 18.042 for judgments that include money awards.

**9.3** Arbitrator(s) may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the fee dispute proceeding. An attorney shall not be awarded more than the amount for services billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.~~7-3~~

**9.4** The original award shall be forwarded to ~~General Counsel~~the Administrator, who shall mail certified copies of the award to each party to the arbitration. ~~General Counsel~~The Administrator shall retain the original award, together with the original fee dispute agreement ~~to arbitrate~~. Additional certified copies of the agreement and award will be provided on request. The OSB file will be retained for six years after the award is rendered; thereafter it may be destroyed without notice to the parties.

**7-49.5** If a majority of the arbitrators cannot agree on an award, they shall so advise ~~General Counsel~~the Administrator within 30 days after the hearing. ~~General Counsel~~The Administrator shall resubmit the matter, de novo, to a new panel within thirty days.

**7-59.6** The arbitration award shall be binding on both parties, subject to the remedies provided for by ORS 36.615, 36.705 and 36.710. The award may be confirmed and a judgment entered thereon as provided in ORS 36.615, 36.700 and ORS 36.715.

**9.7.6** Upon request of a party and with the approval of General Counsel for good cause, or on General Counsel's own determination, the arbitrator(s) may be directed to modify or correct the

award for any of the following reasons:

- a. there is an evident mathematical miscalculation or error in the description of persons, things or property in the award;
- b. the award is in improper form not affecting the merits of the decision;
- c. the arbitration panel or sole arbitrator has not made a final and definite award upon a matter submitted; or
- d. ~~or~~ to clarify the award.

### **Section 8—Public Records and Meetings**10 Confidentiality

**810.1** The arbitration~~resolution~~ of a fee dispute through ~~General Counsel's Office~~the Oregon State Bar Fee Dispute Resolution Program is a private, contract dispute resolution mechanism, and not the transaction of public business.

**810.2** Except as provided in paragraph **810.4** below, or as required by law or court order, all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the arbitrator(s), mediators or arbitrators, and any award rendered by the arbitrator(s), shall not be subject to public disclosure, unless all parties to an arbitration agree otherwise. ~~General Counsel~~The Oregon State Bar considers all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the arbitrator(s), mediators or arbitrators, to be submitted on the condition that they be~~are~~ kept confidential.

~~8.3 Arbitration~~**10.3 Mediations and arbitration** hearings are closed to the public, unless all parties agree otherwise. Witnesses who will offer testimony on behalf of a party may attend ~~the~~an arbitration hearing, subject to the chairperson's or sole arbitrator's discretion, for good cause shown, to exclude witnesses.

**810.4** Notwithstanding paragraphs **810.1**, **810.2**, and **810.3**, lawyer mediators and arbitrators shall inform the Client Assistance Office when they know, based on information obtained during the course of an arbitration proceeding, that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

**810.5** Notwithstanding paragraphs ~~8.1, 810.1, 10.2,~~ and **810.3**, and **810.4**, all electronic and written records and other materials submitted to General ~~Counsel~~Counsel's Office or to the arbitrator(s), mediators or arbitrators during the course of the proceeding, and any award rendered by the arbitrator(s), shall be made available to the Client Assistance Office and/or Disciplinary Counsel for the purpose of reviewing any alleged ethical violation in accordance with BR 2.5 and BR 2.6.

**810.6** Notwithstanding paragraphs **810.1**, **810.2**, **810.3** and **810.4**, General ~~Counsel~~Counsel's Office may disclose to the Client Assistance Office or to Disciplinary Counsel, upon the Client Assistance Office's or Disciplinary Counsel's request, whether a fee arbitration~~dispute resolution~~ proceeding involving a particular

lawyer is pending, the current status of the proceeding, and, at the conclusion of ~~the~~  
an arbitration proceeding, in whose favor the arbitration award was rendered.

**810.7** Notwithstanding paragraphs 810.1, 810.2 and 810.3, if any lawyer whose employment was secured through the Oregon State Bar Modest Means Program or Lawyer Referral Program refuses to participate in fee arbitration, ~~General Counsel~~the Administrator shall notify the administrator of such program(s).

10.8 Mediators and parties who agree to participate in this program expressly waive the confidentiality provisions of ORS 36.222 to the extent necessary to allow disclosures pursuant to Rule 7.5, 10.4, 10.5 and 10.6.

#### **Section ~~9~~11 Immunity and Competency to Testify**

**911.1** Pursuant to ORS 36.660, arbitrators shall be immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity. All other provisions of ORS 36.660 shall apply to arbitrators participating in the Oregon State Bar ~~fee arbitration~~dispute resolution program.



**Appendix A**

**Oregon State Bar  
Fee Arbitration**

) Case No.

Petitioner )

v. )

) Arbitration Award

)

Respondent )

**Jurisdiction**

**Nature of Dispute**

**Amount of Award**

**Opinion**

**Award Summary**

The arbitrator(s) find that the total amount of fees and costs that should have been charged in this matter is: \_\_\_\_\_ \$

~~of fees and costs that should have been charged~~  
~~in this matter is: \_\_\_\_\_ \$~~

Of which the Client is found to have paid: \$

For a net amount due of: \_\_\_\_\_ \$

Accordingly, the following award is made: \$

Client shall pay Attorney the sum of: \_\_\_\_\_ \$

**(or)**

Attorney shall refund to Client the sum of: \$

**(or)**

Nothing further shall be paid by either attorney or client.

/Signature(s) of Arbitrator(s)

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** August 27, 2015  
**From:** Danielle Edwards, Director of Member Services  
**Re:** Appointments to the HOD an UPL Committee

---

### Action Recommended

The following bar groups have vacant seats. Consider appointments to these groups as requested by the committee officers and staff liaisons.

### Background

#### House of Delegates

Region 1 member, **David M. Rosen** (101952), resigned his position on the HOD when he became Deschutes County Bar President. His term in that position recently ended and he is seeking appointment to a vacant region 1 HOD seat.

Region 5 public member, **Paresh Patel**, is requesting reappointment to the House of Delegates. Mr. Patel is the founder and CEO of a payment technology business in Portland and chairman of the Pacific NW Federal Credit Union.

**Recommendations:** David M. Rosen, region 1 delegate, term expires 4/16/2018

Paresh Patel, region 5 public member, term expires 4/17/2017

#### Unlawful Practice of Law Committee

One member resigned from the UPL Committee and the officers and staff recommend the appointment of **Jacob Kamins** (094017). The committee is in need of a prosecutor and Mr. Kamins is with the Benton County DA's Office.

**Recommendation:** Jacob Kamins, member, term expires 12/31/2018

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** Theresa L. (Terry) Wright  
**Re:** Legal Opportunities Coordinator Report

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### **Issue**

Attached is my list of recommendations/suggestions resulting from my work as Legal Opportunities Coordinator for the Board's review and consideration. As noted, I have designated those which I believe are controversial, although I could be wrong, and some that I have deemed non-controversial will become controversial.

### **Options**

The BOG will need to consider the recommendations and determine which, if any, to move forward with. I realize that most of the suggestions made require staff involvement, and I have not attempted to prioritize suggestions based on staff availability.

### **Discussion**

This list is meant as a starting place for the BOG and bar staff to develop a work plan in order to bring some of these proposals to fruition. More information about each item will be available in the near future, but this should give the Board a start.

Unfortunately, I will not be in attendance at the BOG meeting as I will be out of town. I will be working on a very part time basis at least through September if anyone has questions. I stand ready to provide whatever other services the BOG would like me to provide.

It has been a pleasure to be of service to the Bar.

## LEGAL OPPORTUNITIES COORDINATOR'S REPORT

### Summary and Recommendations

Note: Any or all of these recommendations could probably be implemented within the next two years. Some are more controversial than others. Those are marked with an \*. The author agrees with all of the recommendations, except those marked with a double\*\*.

#### Alternatives to Lawyer Representation

\*The Bar should continue to pursue the issue of LLLT's. Under this scheme, new lawyers could work closely with LLLT's, who would refer the new lawyer cases too complicated for the LLLT to handle. Undoubtedly, LLLT's will be working with clients who otherwise would not seek representation.

The Bar could develop and implement a self-represented forms projects, housed at the Bar. This could be a money-making proposition, depending on the structure developed.

#### Bar Admissions

\*Adopt California rule, before applicants can sit for the bar exam:

An applicant has to have completed 15 hours of practical skills requirements in law school; and

An applicant is required to provide 50 hours of pro bono representation while in law school or within one year of bar admission.

(The California model also includes 10 hours of CLE focusing on basic skills and ethics, or participation in Bar-certified mentoring program, within one year of bar admission.)

\*\*Adopt New York rule requiring 50 hours of pro bono work before license is granted

Can include some time in law school

\*Develop a pilot project between the BBX and one or more law schools similar to the Rhode Island model in which a student enters a particular track at the beginning of law school that is heavily oriented skills oriented. Upon successful completion and graduation, graduates are admitted to the Bar without having to take the Rhode Island Bar exam

## Bulletin

Designate one issue a year focusing on issues of interest/usefulness to new lawyers

Designate one issue a year focusing on rural practice

## Buying/Selling Law Practices

Develop a web page focusing on this issue, and include suggestions for alternative methods/suggestions

The Bar should sponsor a “law practice fair” at least once a year at which new lawyers and lawyers interested in selling their practices could meet and discuss possibilities. While retiring lawyers in rural areas should be encouraged to participate in person, the Bar should make Skype/GoogleHangOuts or other technology available. The “meet and greet” portion could be preceded by a CLE (for which participants would receive CLE credit) discussing alternative methods to set up a buy/sell arrangement

## Campaign for Equal Justice/Legal Aid Funding

The Bar should continue to support CEJ financially, and continue to encourage its members and member groups to do so as well.

Funding for legal services programs, including those providing representation for clients above the legal aid guidelines, should continue to be a legislative priority.

## CLE's

Amend Rules to allow CLE credit for programs on marketing, law office management, creating and sustaining virtual law offices, and the like

Add more CLE programming to include above topics (perhaps asking the PLF to include more of these topics, and dropping their afternoon of specific case type presentations)

Create CLE's focusing on discrete task (“unbundled”) representation and alternative fee structures (flat fee, modified contingency), and sliding scale representation

Convene a meeting each year to include all Oregon entities offering or contemplating offerings in the next year to coordinate timing and to avoid repetition

Designate a point person at the Bar to monitor and coordinate between CLE program and their offering organizations

Develop presentations once or twice a year from lawyers who have created alternative delivery structures (i.e. Pacific Crest Legal, Middle Class Law)

Encourage Sections to develop and present basis CLE's in their speciality areas, allowing new lawyers to attend at a reduced cost

Package CLE's in one- to two- hour segments covering discrete topics and make individual segments available as webcasts

#### County Bar Associations

Encourage all local bars to have at least two meetings or social events a year directed at lawyers in their first two years of practice, the timing to coincide with bar swearing in ceremonies.

#### Employment Announcements

Create a "one stop" employment announcement website, available to all Oregon lawyers free of charge

Create a centralized website for contract lawyers to connect with lawyers and firms needing contract lawyers, allowing both entities to post their skills and needs

#### External Proposals

Given the number of individuals interested in and developing proposals for new lawyer employment (Judge Aiken, Judge Walters, Governor Kulongoski), the Bar should designate a Bar staff member to be a "point person" to coordinate these proposals, to the extent possible, given the public stature of those making proposals

#### Incubator/Accelerator Programs

\*The Bar should work with interested parties and law schools to develop an incubator program, to include rural practice

### Law Schools and Legal Education

Encourage each law school in Oregon to create a niche in legal market, whether it be mentoring, technology, etc., with technical assistance provided by the Bar to the extent possible.

\*Work with law schools to create skills-based programs for law students who take the bar exam in February of their third year, leaving approximately two months of legal education remaining for them.

### Materials

The Bar should and/or PLF should continue to develop and keep updated written materials for setting up law practices, especially focusing on access to justice.

The Bar should adapt the Colorado Bar's manual oriented toward new lawyers and access to justice

Review all materials (Tele-law, pamphlets) provided to the public to assess whether the materials adequately address those matters the public needs.

### Mentoring

The Bar should develop and post on line a comparison chart showing all mentorships available in Oregon, their sponsors, and their respective goals and structures. To the extent possible, mentorship programs should be consolidated, perhaps to create on-going mentorships that move from one phase of law practice to another.

Continue the New Lawyer Mentoring Program, perhaps to add a voluntary pro bono project

### New Lawyers Section

The Bar should continue to support the New Lawyers Section, but may want to "tweak" it in some ways. For example, the BOG should determine how much of Bar dues should be contributed toward purely social events as compared to networking events, and the Section may want to divert resources from CLE's (which are well covered elsewhere) toward other activities which would assist new lawyers in developing their practices and professional identities.

### ORPC

\*Adopt Model Rule 6.1, identifying an aspirational standard for lawyers doing pro bono work, perhaps with modification to include reduced fee cases

### Pro Bono

Sign on to the ABA's proposal to provide pro bono information on line, and develop a reward system for lawyers who contribute a certain amount of time to answering questions

### Public Relations

The Bar should create a public relations campaign addressing the availability of low cost legal services to appropriate populations

The Bar should develop a campaign to assist the public in identifying when they have a legal problem and what a lawyer (or LLLT) can assist them with

Broaden the public relations campaign the Bar has to highlight Lawyer Referral, pro bono, and modest means.

### Rural Practice

The BOG should make supporting rural practice a priority, sending the message to the membership of the importance of rural lawyers, rural law practice, and the opportunities available to lawyers in rural areas

The Bar should develop a video to be streamed on its website featuring rural practice, possibly to include interviews with judges about the joys of rural practice.

\*Modify LRAP rules to prioritize awards to lawyers in rural areas of the state

Encourage urban lawyers to provide sliding scale representation to rural clients through creative use of technology

Expand the availability of funds to provide grants to law students gaining experience in rural areas through the Diversity and Inclusion program, and create other opportunities through other Bar programs.

Determine if it would be feasible to provide small grants to lawyers moving to rural areas to set up law practices.



## Sections

Sections should be encouraged to make more seasoned members available to newer lawyers to assist with individual cases

Encourage Sections with yearly CLE's to include informal networking (see for example this year's Labor and Employment Law Section CLE at Salishan which includes breakfast for new lawyers to meet with more experienced lawyers regarding issues of interest)

Encourage larger sections to develop monthly informal networking opportunities, possibly with at least one located out of the Portland metro area

Encourage sections to offer scholarships to annual conference (i.e. Labor and Employment and Litigation Sections)

## Senior/Retired Lawyers and Judges

\*The Bar should create at least an informal "senior" section, with the specific purpose of providing newer lawyers an in-road to the profession. The lawyers provided should be at or near retirement so that they have more free time available to assist newer lawyers.

Those lawyers with "active pro bono" membership status should be encouraged to co-counsel pro bono cases with newer lawyers

\*Retired judges should be included in this group to provide litigation advice and coaching regarding individual cases being handled by new lawyers.

## Technical Assistance

\*The Bar should provide technical assistance or provide materials available to new lawyers wanting create non-profit legal organizations providing legal services to

## WebSites

Create a web page specifically oriented toward law students

Create a web page for new lawyers, including as many links as possible, including to PLF materials especially their forms library, and ABA materials

Create a web page summarizing all programs currently in place in Oregon (and maybe elsewhere?) regarding new lawyers and access to justice Section)

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** Rich Spier, OSB President  
**Re:** Selection of BOG Liaison to Board of Bar Examiners

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### Issue

Pursuant to the bylaws adopted in July 2015, the BOG will have a liaison to the Board of Bar Examiners.

### Discussion

As some of you will recall, a fair amount of BOG and senior staff energy has been devoted over the last couple of years to clarifying and formalizing the relationship of the Board of Bar Examiners to the OSB. In addition to a modest statutory amendment, the understanding was memorialized in a new bylaw, set forth below. The importance of establishing and maintaining a good working relationship between the BOG and BBX cannot be overstated, not only because of the Bar's general responsibility for the admissions function, but because of the perspective about practice and the profession that the BOG can bring to the BBX.

The BBX is comprised of 12 lawyers and 2 public members. It is responsible for developing and grading the bar exam, including investigating and screening applicants for character and fitness. In appropriate cases, it interviews applicants and conducts evidentiary hearings. It also develops rules, for adoption by the Supreme Court, relating to admission by other than examination. The BBX typically meets 8-9 times each year, plus two multiple-day grading sessions.

#### **Article 28 Admissions**

##### **Section 28.1 Board of Bar Examiners**

Pursuant to ORS 9.210, the Supreme Court appoints a Board of Bar Examiners (BBX) to carry out the admissions function of the Oregon State Bar. The BBX recommends to the Supreme Court for admission to practice those who fulfill the requirements prescribed by law and the rules of the Court. The BBX's responsibilities include: investigating applicants' character and fitness, developing a bar examination, determining the manner of examination, determining appropriate accommodations for applicants, grading the bar examinations and setting standards for bar examination passage. The BBX may appoint co-graders to assist with the grading of examinations. The BBX may also recommend to the Court rules governing the qualifications, requirements and procedures for admission to the bar, by examination or otherwise, for law student appearance, and other subjects relevant to the responsibilities of the BBX.

**Section 28.2 Nominations**

The bar and the BBX will recruit candidates for appointment to the BBX and for appointment as co-graders. The BBX will solicit input from the Board of Governors before selecting co-graders and nominating candidates for appointment to the BBX.

**Section 28.3 Liaisons**

The Board of Governors shall appoint one of its members as a liaison to the BBX. The BBX may appoint one of its members as a liaison to the Board of Governors. The liaisons shall be entitled to attend all portions of the BBX and Board of Governor meetings, including executive and judicial sessions.

**Section 28.4 Admissions Director**

The Admissions Director shall report to and be supervised by the Director of Regulatory Services, under the overall authority of the Executive Director. The Executive Director and Director of Regulatory Services will make the hiring, discipline and termination decisions regarding the Admissions Director. The Executive Director and Director of Regulatory Services will solicit BBX's input into these decisions and give due consideration to the recommendations and input of the BBX. If the BBX objects to the final hiring decision for the Admission Director, recruitment will be reopened.

**Section 28.5 Budget**

With the approval of the Oregon Supreme Court, the BBX may fix and collect fees to be paid by applicants for admission. A preliminary annual budget for admissions will be prepared by the Admissions Director and Director of Regulatory Services in consultation with the BBX. Upon approval by the BBX, the budget will be submitted to the Board of Governors. The final budget presented to the Board of Governors will be provided to the BBX. Upon adoption by the Board of Governors, the budget will be submitted to the Supreme Court in accordance with Bylaw 7.202, and the BBX may make a recommendation to the Supreme Court regarding adoption of the budget. The budget will align with bar policy generally after consideration of the policy goals and objectives of the BBX. 71

**Section 28.6 Amendments**

Any proposed amendment to Article 28 shall be submitted to the BBX and Supreme Court for consideration and the BBX shall make its recommendation to the Supreme Court regarding adoption of the proposed amendment. Upon Supreme Court approval, the Board of Governors may adopt such amendments in accordance with Article 29.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** Repurposing the Members' Room

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### **Action Requested**

Authorize the Executive Director to repurpose the Members' Room to accommodate nursing mothers and members with health needs that require a private, hygienic space. (Note: this issue was discussed at the July 24, 2015 special meeting when there was no quorum, so the BOG needs to either ratify the decision made that day or refine it after further discussion.

### **Discussion**

#### *History*

The OSB has had a Members' Room for at least 30 years. In the old Kruse Way building, the Members' Room was in the basement adjacent to the law library. Although intended as a place visiting members could use to make phone calls or have private meetings, the Members' Room served mostly as an extra meeting room for OSB committees and similar groups.

Despite the historical limited use by individual members, a Members' Room was incorporated into the planning for the current OSB Center. Frank Hilton (then serving on the BOG) donated his father's 1940's office furniture and members of the Legal Heritage Interest Group (LHIG) worked with Executive Director Karen Garst to select the rug and two reproduction glass-front bookcases for the room. The words "Attorney at Law" were painted on the glass door to complete the vintage law office look.

The Members' Room continues to be little-used by members. It is used most often as a break-out room during disciplinary trials and arbitrations; it is also used by staff on occasion during their breaks. BOG members are perhaps the most frequent users of the room.

#### *Request for Change*

In early June I was contacted by a member (I assumed she was a representative of OWLs, but that may not actually be the case) who gently chastised me for the OSB not having a "lactation room" for use by members who visit the OSB for meetings and CLE programs. She expressed surprise and disappointment that the OSB was not a leader in accommodating our women members on this issue.<sup>1</sup>

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<sup>1</sup> Oregon law requires all employers with 25 or more employees to have a private space dedicated for lactation that is not a bathroom. Bar employees who do not have private offices have been able to use a small internal meeting room that does not have a glass door.

Recognizing the merits of the member's inquiry, I began working with staff to identify what needed to be done to create an appropriate space for breast-feeding or expression of milk. We determined that the room needs to be in the "public" portions of the building, equipped with a locking door, and offering privacy from those passing by. Interior furnishings should include a table, comfortable chair, and a small refrigerator; the table surface must be washable and sanitary. A water supply would be desirable, but not required if the room can be near a bathroom or other water supply for washing equipment after use.

After considering the alternatives, I determined that the Members' Room was the best location for a lactation room. It is accessible to visitors, is close to a bathroom, and could be made suitable by merely changing out the vintage furniture, screening the glass panels, and putting a lock on the door. The photos and other artifacts in the room could be retained and the room could continue to be available to all members when not in use for lactation.

At the June 2015 BOG meeting, I brought the matter to the BOG's attention to ensure there was support for adapting the Members' Room (by replacing the vintage desks, chairs and file cabinet) to accommodate our female members. There being no concerns expressed by the BOG, I notified the Chair of the LHIG and obtained Frank Hilton's authorization to dispose of the vintage furniture (the alternative was to return it to him). I also posted a notice on the OWLs listserve seeking a buyer for the desks and chairs).

#### *The July 24, 2015 BOG meeting*

Within a few days of the listserve posting, a handful of current and former members of the LHIG contacted the BOG strongly opposing any change in the Members' Room. At the July 24, 2015 special meeting, representatives of the Legal Heritage Interest Group appeared before the BOG to urge the BOG to keep the Members' Room intact. (Transcripts of their remarks are attached.) Also present were representatives of Oregon Women Lawyers who expressed their equally strong view that the OSB should have an appropriate place to accommodate nursing mothers that would allow them to participate fully in bar activities.

In the ensuing discussion, BOG members present expressed support for making a space available for nursing mothers. At least one BOG member also encouraged making the room suitable for anyone with a health issue that requires a private, privacy space.

At the conclusion of the discussion, Mr. Pagan moved, seconded by Mr. Chaney, that the staff work with the LHIG to repurpose the Members' Room to repurpose it as proposed, "while retaining the 'traditional office' feel of the room." The motion passed 6-5, but in the absence of a quorum, the vote is advisory only.

#### *Current Status*

Since July 24, staff has investigated the options for furnishing the room. We are finding it a challenge to continue the "traditional feel" with suitable new furniture. (Note: we are also trying to avoid buying expensive new pieces that aren't compatible with existing OSB furniture.)

The plan is to retain the two glass-front bookcases, and to replace the two large desks with a credenza (for storage and display) and a smaller, laminate-surface table. We have also identified a small “portable sink” that will allow for washing of equipment. The four wooden chairs will be replaced with a modern adjustable desk chair and two or three side chairs (existing pieces). If space allows, we may include an upholstered chair or small sofa (we have a few options from existing pieces).

August 11, 2015

To all Board of Governor Members

From Janet Kreft

There was less than a quorum present at the meeting on July 24, 2015.

I am unsure of exactly who was present, so I am sending out the notes of the two speakers from the Legal Heritage Interest Group.

A handwritten signature in cursive script that reads "Janet Kreft". The signature is written in dark ink and is positioned on the right side of the page.



July 24, 2015

Remarks from Janet Kreft

Good Afternoon.

I am here today with other members of the committee to respectfully request the Board of Governors to reconsider and reverse their recent decision to “re-purpose” the Members Room as a lactation center.

In 2007, we built this wonderful new 125,000 square foot building for all 14,000 member of the Oregon State Bar.

A decision was made by the prior Executive Director for a “Members Room” to be decorated in a 1930's period style, inspired by the donation of Frank Hilton, Jr. of his father's furniture from his 1930's law office in downtown Portland.

Although the furniture was dated, the room would actually be high-tech so that bar members could relax there between other obligations, open up their own laptop computers, do work from a distance, have privacy for telephone calls and conferences, and browse the old law books, documents, notebooks of the old Tent Shows, etc.

This small room was placed next to the two larger group meeting rooms in “Heritage Hallway”, where the walls are lined with framed photographs of Early Oregon Lawyers and the photo timeline of Oregon Women in the Law.

The Legal Heritage Interest Group was charged with decorating the room in 2007.

As Chair of the Committee that year, I worked closely with prior

ED Karen Garst to pick out the rugs, bookcases, and the glass door. I called on Paul Nickel a few times. Anna Zanolli in Publications worked with me to enlarge some photographs of courthouses of distant counties. The idea was to make attorneys from those distant counties feel welcome.

We put an ad in the bulletin for old documents. I didn't get much of a response, except that Randall Kester contacted me to come and pick up some old leather-bound law books.

Our group meets quarterly. I was always on the agenda to give the "Members Room" update.

I regularly asked a staff member on site here, "Do you ever see anyone in there?" I was told, "Yes." There were visits from attorneys from across the State of Oregon. Staff occasionally ate lunch there, and a few depositions have taken place there.

I suggest that the Members Room not be dismantled and repurposed. The original use should be encouraged.

I suggest the Members Room be included on the list for "Scheduled Rooms" to increase usage.

- Frost or opaque
- Curtain?
- Small number use this.
- Give a few months for decision.
- Work out.

A handwritten signature in cursive script, reading "Janet Kester". The signature is written in black ink and is positioned to the right of the bulleted list.

7/24/15

Thank you. My name is Rachel Lynn Hull and I am the chair of the Legal Heritage Interest Group. We believe that the Executive Director and the Board of Governors has, and should have, final say in how bar facilities are used to accomplish the mission of the organization.

But an organization that relies heavily on volunteers, and exists for the service of its members, must make decisions using a fair process that includes all stakeholders.

The stakeholders here include:

- The Legal Heritage Interest Group, whose interest Janet outlined;
- The entire membership of the Oregon State Bar, who were given access to the member's room as a benefit when the bar moved to the current location;
- Bar staff, who are in the building every day and use the spaces available to do the work of the bar; and
- Visitors and employees who need a clean, private space for pumping, lactation, or other personal needs. The size and needs of this group will change from day to day.

We request that the Board of Governors reconsider this decision and determine the final location of a lactation room using a process that includes input from all stakeholders. This process should review all possible locations for privacy, access, and best use.

We are not yet convinced that a fair process will conclude that the member's room is the best location.

If it is, the Legal Heritage Interest Group offers our assistance and support in transitioning the space to both preserve the original purpose and accommodate newly identified needs. Thank you.

**Oregon State Bar**  
**Meeting of the Board of Governors**  
June 26, 2015  
**Open Session Minutes**

The meeting was called to order by President Richard Spier at 1:40 p.m. on June 26, 2015. The meeting adjourned at 4:25 p.m. Members present from the Board of Governors were James Chaney, Guy Greco, R. Ray Heysell, Theresa Kohlhöff, John Mansfield, Audrey Matsumonji, Vanessa Nordyke, Ramon A. Pagan, Travis Prestwich, Per Ramfjord, Kathleen Rastetter, Joshua Ross, Kerry Sharp, Charles Wilhoite, Timothy Williams and Elisabeth Zinser. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Susan Grabe, Mariann Hyland, Judith Baker, Dani Edwards, Terry Wright and Camille Greene. Also present was Carol Bernick, PLF CEO; Tim Martinez, PLF BOD; Karen Clevering, ONLD Chair.

**1. Selection of New Executive Director**

**Motion:** Mr. Heysell moved, Mr. Mansfield seconded, and the board voted unanimously to select Helen Hirschbiel as the new Executive Director.

**Motion:** Mr. Ramfjord moved, seconded by Mr. Greco, to set the new Executive Director's salary and \$185K with other compensation and benefits the same as the current ED's.

**Motion:** Mr. Wilhoite moved, seconded by Mr. Chaney that the Executive Director be employed "at will".

During the ensuing discussion, it was clear that the BOG supported a reasonable severance payment in the event of termination without cause. Mr. Mansfield, seconded by Ms. Nordyke suggested that the President and Executive Director present a recommendation at the September meeting. Mr. Wilhoite withdrew his motion.

**2. Report of Officers & Executive Staff**

**A. Report of the President**

As written. Mr. Spier thanked Mr. Prestwich for his leadership during the 2015 legislative session by presenting a framed duplicate original of the *cy pres* bill signed by the Governor.

**B. Report of the President-elect**

No report.

**C. Report of the Executive Director**

As written. Ms. Stevens also updated the board on the 2014 Program Evaluations, inquired if there was any desire for follow-up to last Fall's board orientation, discussed repurposing the members' room to a nursing room at the Bar Center, encouraged BOG members to read at least the first half of *The Relevant Lawyer* about changes happening in the profession, and reminded BOG members of the September 1, 2015 deadline for President-elect candidate statements.

**D. Director of Regulatory Services**

As written.

**E. Director of Diversity & Inclusion**

Ms. Hyland reported that she has hired Chris Ling as the new D&I Coordinator, the Diversity storywall will be online soon, and OLIO will be held in Hood River August 7-9 with many local law firms providing financial support. Ms. Matsumonji encouraged BOG members to attend.

**F. MBA Liaison Reports**

Mr. Ross reported on the May 13, 2015 MBA board meeting.

**G. Oregon New Lawyers Division Report**

In addition to the written report, Ms. Clevering reported on the ONLD's middle-school art and essay contests, socials, CLEs, the Spring Meeting in Tampa, FL, and working with OLIO.

**3. Professional Liability Fund**

Mr. Martinez updated the board on the PLF's financial status and the expectation that the board will not be seeking an increase in the annual assessment. Ms. Bernick reported that claims are down from the previous year, but the severity of claims has increased. She presented the PLF's Excess Committee report and the underwriting that will be done to make rates more competitive with the commercial market. Ms. Bernick also reported that the PLF has achieved its desired "net position" and will be evaluating whether it continues to be the correct amount.

**4. OSB Committees, Sections and Councils**

**A. Client Security Fund Committee**

Claim 2015-11 GERBER(Huntington)

Ms. Stevens asked the board to consider the request of the Claimant that the BOG reverse the CSF Committee's denial of his claim, as presented in her memo. **[Exhibit A]**

**Motion:** Mr. Matsumonji moved, Mr. Mansfield seconded, and the board voted unanimously to uphold the committee's denial of the claim. Ms. Nordyke abstained.

Claim 2015-14 WEBB(Godier)

Ms. Stevens asked the board to review the CSF Committee's recommendation to award \$45,000 to Mr. Godier, as explained in her memo. **[Exhibit B]**

**Motion:** Mr. Williams moved, Mr. Pagan seconded, and the board voted unanimously to award the client \$45,000.

**B. Legal Services Program Committee**

Ms. Baker reported that the LSC is beginning its periodic evaluation of Oregon's Legal Aid programs, with particular attention to whether each program is effectively serving the statewide model and goals to meet the best interests of the clients. Ms. Grabe added that there will be a 20% reduction in money from the federal level to the state level for legal services.

**5. BOG Committees, Special Committees, Task Forces and Study Groups**

**A. Board Development Committee**

Ms. Matsumonji asked the board to vote on the recommended appointments for the Commission on Judicial Fitness and Disability, the Council on Court Procedures, the OSB HOD, and the ABA Young Lawyer HOD.

- Motion:** The board voted unanimously to approve the committee motion to appoint Judy Parker to the Commission on Judicial Fitness and Disability board. **[Exhibit C]**
- Motion:** The board voted unanimously to approve the committee motion to appoint Troy Bundy, Kenneth Crowley, and Derek Snelling to their first term on the Council on Court Procedures and reappoint Jay Beattie and Robert Keating to their second terms on the Council. **[Exhibit D]**
- Motion:** The board voted unanimously to approve the committee motion to appoint the following to the House of Delegates: **Region 2-** Megan E. Salsbury, 134745; **Region 3-** Justin Rosas, 076412; and Daniel Lang, 790078; **Region 4-** Jaimie Fender, 120832; Dylan S. R. Potter, 104855; and Simeon D. Rapoport, 874194; and **Region 6-** Callen Sterling, 124663. **[Exhibit E]**
- Motion:** The board voted unanimously to approve the committee motion to appoint Jovita T. Wang to the ABA House of Delegates. **[Exhibit F]**
- B.** Budget and Finance Committee
- Ms. Kohlhoff gave a general committee update.
- C.** Governance and Strategic Planning Committee
- Mr. Heysell asked the board to create the position of Immediate Past President as a non-voting *ex officio* member of the BOG as set forth in **[Exhibit G]**.
- Motion:** The board voted unanimously to approve the committee motion.
- Mr. Heysell asked the board to recommend that the Supreme Court amend Bar Rule of Procedure 8.6 to eliminate the requirement to pay inactive fees for the years of suspension or resignation. He explained that there is no compelling reason to continue the current requirement and eliminating it will simplify the configuration required to automate the reinstatement process with the new organization management software.
- Motion:** The board voted unanimously to approve the committee motion to recommend the Supreme Court amend Bar Rule of Procedure 8.6.
- Mr. Heysell asked the board to consider the proposed revisions to the bar's unlawful practice of law investigation and enforcement procedures (OSB Bylaw Article 20) in light of the Supreme Court's recent decision in *North Carolina State Board of Dental Examiners v Federal Trade Commission*, 135 SCt 1101 (2015). **[Exhibit H]**
- Motion:** Mr. Greco moved, Mr. Prestwich seconded, and the board voted unanimously to waive the one meeting notice required for bylaw amendments.
- Motion:** The board voted unanimously to approve the committee motion to amend OSB Bylaw Article 20.
- D.** Public Affairs Committee
- Mr. Prestwich and Ms. Grabe updated the board on the latest legislative activity and the status of the bar's law improvement proposals. There was considerable discussion regarding support of Senate Bill 822 and the recording of grand jury proceedings. No motion was presented. The board also discussed the best way to show appreciation for lawyer-legislators and others who played a role in helping the OSB achieve its objectives during the session.
- E.** Task Force on International Trade in Legal Services
- Ms. Hirschbiel presented the Oregon State Bar International Trade in Legal Services Task Force report on their review of regulations relating to the practice of law in Oregon to determine

whether any “unnecessary barriers to trade” exist in contravention of free trade agreements to which the United States is a party. Ms. Hirschbiel asked the board to approve the recommendations in the final report. **[Exhibit I]**

**Motion:** Ms. Zinser moved, Ms. Rastetter seconded, and the board voted unanimously to send the House Counsel Rules to the Board of Bar Examiners for review and comment.

**Motion:** Mr. Greco moved, Mr. Ramfjord seconded, and the board voted unanimously to direct the Legal Ethics Committee to formulate a formal ethics opinion on RPPC 8.5.

## **6. Other Action Items**

Mr. Mansfield proposed that the OSB be a Silver Sponsor of the District of Oregon Conference at the \$1000 level, as outlined in **[Exhibit J]**. In the discussion that followed, it was suggested that the annual budget include some amount for this kind of sponsorship that is distinct from the budget for bar and community dinners and events.

**Motion:** Mr. Mansfield moved, Ms. Nordyke seconded, and the board voted unanimously to approve the sponsorship at the Silver level.

Ms. Edwards presented various appointments to the board for approval. **[Exhibit K]**

**Motion:** Mr. Wilhoite moved, Ms. Rastetter seconded, and the board voted unanimously to approve the appointments.

Ms. Wright, OSB Legal Opportunities Coordinator, gave a quick summary of her work to date; she anticipates having a report for the BOG in September that will include some recommendations from the recent “Stakeholders Meeting.”

## **7. Consent Agenda**

**Motion:** The board voted unanimously to approve the consent agenda of past meeting minutes and the request of the Sole and Small Firm Practitioners to change its name to the Solo and Small Firm Section.

## **8. Closed Session (Executive Session pursuant to ORS 192.660(1)(f) and (h)) General Counsel/UPL Report – see CLOSED Minutes**

**Motion:** Mr. Greco moved, Mr. Mansfield seconded, and the board voted unanimously to approve Mr. McCulloch’s ULTA claim. Mr. Ross abstained.

**Motion:** Ms. Ramfjord moved, Mr. Pagan seconded, and the board voted unanimously to approve Mr. Davis’s ULTA claim.

## **9. Good of the Order (Non-action comments, information and notice of need for possible future board action)**

Mr. Spier asked the BOG to consider whether to offer a stipend to the OSB president, since helping to offset the lost income might make it more feasible for younger and solo lawyers to serve. After discussion, the GSP was asked to bring a proposal to the September meeting.

**Oregon State Bar  
Board of Governors Meeting  
June 26, 2015  
Executive Session Minutes**

Discussion of items on this agenda is in executive session pursuant to ORS 192.660(2)(f) and (h) to consider exempt records and to consult with counsel. This portion of the meeting is open only to board members, staff, other persons the board may wish to include, and to the media except as provided in ORS 192.660(5) and subject to instruction as to what can be disclosed. Final actions are taken in open session and reflected in the minutes, which are a public record. The minutes will not contain any information that is not required to be included or which would defeat the purpose of the executive session.

A. Pending or Threatened Non-Disciplinary Litigation

Ms. Hirschbiel informed the board of non-action items.

B. Other Action Items

Ms. Hirschbiel asked the board to consider approval of Ross McCulloch's ULTA claim for the return of \$30,070.42.

**Motion:** Mr. Wilhoite moved, Mr. Chaney seconded, and the board voted unanimously to approve Mr. McCulloch's ULTA claim. Mr. Ross abstained.

Ms. Hirschbiel asked the board to consider approval of Derick Davis's ULTA claim for the return of \$6,650.24.

**Motion:** Ms. Nordyke moved, Ms. Matsumonji seconded, and the board voted unanimously to approve Mr. Davis's ULTA claim.



**Oregon State Bar  
Board of Governors Meeting  
June 26, 2015  
Special Closed Session Minutes**

Discussion of items on this agenda is in executive session pursuant to ORS 192.660(2)(a). Final actions are taken in open session and reflected in the minutes, which are a public record. The minutes will not contain any information that is not required to be included or which would defeat the purpose of the executive session.

A. Consideration of Executive Director Candidates

Mr. Spier asked the board to consider the two final candidates for Executive Director. All board members presented their views.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 26, 2015  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** CSF Claim No. 2015-11 GERBER (Huntington)—Request for BOG Review

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### Action Recommended

Consider the request of the Claimant that the BOG reverse the CSF Committee's denial of his claim.

### Discussion

Claimant Huntington retained Susan Gerber in October 2013 to pursue post-conviction relief from his criminal conviction. Huntington's mother gave Gerber \$5,000 as an "earned on receipt" fixed fee for Gerber's services and \$2,000 for the services of an investigator.

Huntington signed Gerber's fee agreement<sup>1</sup> on October 15, 2013. On November 15, Huntington filed a *pro se* petition for post-conviction relief, accompanied by his Affidavit of Indigency. On the same day, Gerber filed a notice of representation; the court then issued a limited judgment noting that Gerber was retained counsel and giving judgment to the state for the filing fee of \$252.

Shortly after she was retained by Huntington, Gerber left the Rader firm. Staff has confirmed that the firm disbursed to Gerber an amount equal to the unearned fees on her pending cases; in the newer cases, the entire amount of the prepaid fee was distributed to Gerber.

The state moved for an extension of time to respond to the *pro se* petition so that it could respond to the amended petition that would be filed by Gerber. When Gerber failed to timely file the amended petition, the court dismissed the *pro se* petition on January 29, 2014. On February 3, Gerber moved to vacate the dismissal, arguing that the local court rules allowed her 180 days to file her amended petition. The court granted the motion and Gerber filed an amended petition in early March.

The state moved to dismiss on April 2, 2014. Gerber did not respond, and on May 1, the court again dismissed the petition. The court also wrote to the bar expressing "grave concerns" about Gerber's performance. Huntington had no further contact with Gerber. She has not accounted for nor returned any of the money paid on Huntington's behalf.

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<sup>1</sup> The agreement was with the firm of Rader, Stoddard and Perez, where Gerber was employed at the time.



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 26, 2015  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** CSF Claim No. 2015-14 WEBB (Godier)

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### Action Recommended

Review the CSF Committee's recommendation to award \$45,000 to the Godier.

### Discussion

Godier hired West Linn attorney Sandy Webb in November 2014 to represent him in a medical malpractice claim on a contingent fee basis. Godier and Webb agreed that, in addition to reimbursement of expenses, Webb would receive 33% of any pre-trial settlement, or 40% of a trial award.

In December 2014, Webb negotiated a settlement with one of the defendants for \$100,000. She deposited the settlement funds into her trust account and immediately transferred \$6,000 to Godier. Approximately 10 days later, Webb sent Godier a check for \$46,000 as the balance of his share of the settlement proceeds, but it bounced.

Based on emails between Godier and Webb about the bounced check, it appears Webb calculated Godier's share as follows:

|                      |                 |
|----------------------|-----------------|
| Settlement           | 100,000         |
| Webb's fees & costs  | <u>(48,000)</u> |
| Godier's share       | 52,000          |
| Initial distribution | <u>(6,000)</u>  |
| Balance              | 46,000          |

Webb never provided Godier with a breakdown of the costs.<sup>1</sup> When the first \$46,000 check bounced, Webb told Godier she had inadvertently paid trial fees from trust rather than her business account, leaving it \$675 short. She promised to cover the shortfall in her trust account and send another check; that one too was returned NSF.<sup>2</sup> By the end of January, Webb was no longer communicating with Godier.

<sup>1</sup> Webb's 33% fee was \$33,333, indicating she collected \$14,457 in unidentified costs.

<sup>2</sup> Trust account records obtained by DCO reflect that on the same day that she deposited Godier's settlement proceeds, she withdrew a total of \$94,550. Five days later she wrote a check for \$6,000 (first payment to Godier). Two other checks were also written within a few days totaling \$8,000. We have no information as to what they were for. The net result is that Webb sent the \$46,000 check when she had only a little more than \$1200 in the account.

In response to Godier's continuing demands for his funds, Webb's husband sent Godier \$1000. Godier states he is unsure of what he is really owed, but has not offered any evidence that the costs claimed by Webb were not legitimate.

There are currently four matters pending against Webb in DCO. In addition to a complaint based on this CSF matter, there are three trust account overdraft matters.

The CSF Committee found this claim eligible for an award of \$45,000. The Committee also voted to waive the requirement that Godier obtain a judgment against Webb on the ground that Godier is of limited means and a judgment against Webb is likely uncollectible at this time. It is not uncommon in these situations for OSB staff to pursue a civil judgment; two members of the CSF Committee also volunteered to do it for the Bar. Note, too, that if Webb is disciplined in connection with her handling of Godier's funds (as is fully expected), reimbursement of the CSF will be a condition of reinstatement.

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# OREGON STATE BAR

## Board of Governors

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**Meeting Date:** June 26, 2015  
**Memo Date:** June 26, 2015  
**From:** Audrey Matsumonji, Board Development Committee Chair  
**Re:** Commission on Judicial Fitness and Disability Board Appointment

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### Action Recommended

Approve the committee's recommendation to appoint Judy Parker to the Commission on Judicial Fitness and Disability board.

### Background

The Commission on Judicial Fitness and Disability reviews complaints about Oregon state judges and justices of the peace and investigates when the alleged conduct might violate the state's Code of Judicial Conduct or Article VII (amended), Section 8 of the state constitution. The Commission also investigates complaints referred by the Chief Justice that a judge has a disability which significantly interferes with the judge's job performance.

As provided in ORS 1.410 the OSB Board of Governors appoints three members to the Commission board for four-year terms. The Commission board also includes three public members appointed by the Governor and confirmed by the Senate and three judges appointed by the Supreme Court.

During the June meeting, the Board Development Committee evaluated a request from Susan Isaacs, Executive Director of the Commission, to appoint one new member. After reviewing a list of volunteer candidates and a lengthy discussion regarding the Commission's needs, the committee unanimously voted to recommend the appointment of Judy Parker.

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# OREGON STATE BAR

## Board of Governors

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**Meeting Date:** June 26, 2015  
**Memo Date:** June 26, 2015  
**From:** Audrey Matsumonji, Board Development Committee Chair  
**Re:** Council on Court Procedures Appointments

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### Action Recommended

Approve the committee's recommendation to appoint Troy Bundy, Kenneth Crowley, and Derek Snelling to their first term on the Council on Court Procedures and reappoint Jay Beattie and Robert Keating to their second terms on the Council.

### Background

The Council on Court Procedures was created by the Legislature to review the Oregon laws relating to civil procedure and coordinate and study proposals concerning the Oregon laws relating to civil procedure advanced by the membership. Pursuant to ORS 1.730(1)(d) the Board of Governors appoints 12 attorney members to serve on the Council.

The time-honored practice is to have a balance between members who represent plaintiffs and half who represent defendants. Furthermore, the statute indicates the lawyer members shall be broadly representative of the trial bar and the regions of the state. Taking these requirements into consideration, after a lengthy discussion of the volunteer candidates, the committee recommends the reappointment of Jay Beattie and Robert Keating, two defense practitioners. The committee further recommends the appointment of Troy Bundy and Kenneth Crowley, both defense practitioners, and Derek Snelling, a plaintiff's attorney. Although these five appointments are defense-heavy, they ensure a practice balance when factoring in the other seven continuing council members.

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# OREGON STATE BAR

## Board of Governors

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**Meeting Date:** June 26, 2015  
**Memo Date:** June 26, 2015  
**From:** Audrey Matsumonji, Board Development Committee Chair  
**Re:** OSB House of Delegates Appointments

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### Action Recommended

Approve the committee's recommendation to appoint seven members to the OSB House of Delegates.

### Background

The Board of Governors are responsible for appointing members to the House of Delegates when vacancies occur. The following regions have vacant positions due to resignations or lack candidate interest from the April HOD election. The Board Development Committee recommends the following appointments.

**Region 2-** Megan E. Salsbury, 134745

**Region 3-** Justin Rosas, 076412; and Daniel Lang, 790078

**Region 4-** Jaimie Fender, 120832; Dylan S. R. Potter, 104855; and Simeon D. Rapoport, 874194

**Region 6-** Callen Sterling, 124663



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# OREGON STATE BAR

## Board of Governors

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**Meeting Date:** June 26, 2015  
**Memo Date:** June 26, 2015  
**From:** Audrey Matsumonji, Board Development Committee Chair  
**Re:** ABA House of Delegates Appointment

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### Action Recommended

Approve the committee's appointment recommendation for Oregon's Young Lawyer Representative to the ABA House of Delegates.

### Background

Based on ABA rules, Oregon has four elected delegate seats on the House of Delegates. If a state is entitled to four or more seats on the HOD one of the seats must be designated for a lawyer less than 35 years of age at the beginning of the term.

Andrew Schpak is the current Young Lawyer Delegate, but he will resign at the conclusion of the 2015 Annual Meeting this August. The remaining one year term must be filled by appointment.

After a thorough review of the six qualified candidates who expressed an interest, the committee selected Jovita T. Wang to recommend for appointment.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 27, 2015  
**From:** Ray Heysell, Chair, Governance and Strategic Planning Committee  
**Re:** Creation of the Position of Immediate Past President

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### Action Recommended

Create the position of Immediate Past President as a non-voting *ex officio* member of the BOG as set forth below.

### Discussion

#### *Immediate Past President*

The GSP Committee unanimously supports the establishment of an informal position of Immediate Past President (IPP). Many organizations have such a position, with the objective of retaining the experience of the past president for the benefit of the next years' board.

There is no provision for this position in the Bar Act,<sup>1</sup> which designates the officers as "president, president-elect and two vice presidents."<sup>2</sup> The proposal as approved by the Committee is to make the IPP an informal position, to be occupied as agreed between the IPP and the BOG from year to year. The duties of the IPP would also be as agreed between the IPP and the BOG.

The most logical place to incorporate the new position is in the bylaws dealing with officers:

#### ***Section 2.2 Officers***

##### *Subsection 2.200 Duties*

##### (a) President

The President presides at all meetings of the Board and has the authority to exercise the Board's power between board meetings and to take appropriate action whenever the

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<sup>1</sup> 9.060 Officers; election; vacancies. A president, president-elect and two vice presidents shall be elected by the governors each year immediately following the annual election of governors and before the newly elected governors have qualified. The president, president-elect and vice presidents shall be elected from among the attorney board members. All officers shall continue in office until their successors are elected and qualify. Vacancies in any of the offices shall be filled by the board by appointment for the remainder of the term. All officers shall take office as provided by the bar bylaws.

<sup>2</sup> The Committee will recall a discussion earlier this year regarding the disconnect between the statute and the bylaws, the former having not been amended when the BOG eliminated the position of vice-president. Moreover, under the historical practice that the vice-presidents were the senior class members not chosen as president or president-elect, we occasionally have three, not two. In January 2015, the Committee recommended seeking a change in the Bar Act in 2017 and in the meantime just ignoring the inconsistency with current practice.

President finds that a board meeting is not necessary or cannot reasonably be convened. However, the President's action must be consistent with any actions taken or policies previously adopted by the Board or by the membership. The President must report any such action at the next board meeting. The President performs such other duties as the Board directs.

(b) President-Elect

The President-elect performs the duties of the President in the absence, inability or refusal of the President to perform those duties. The President-elect performs other duties as the Board directs.

(c) Immediate Past President

The Immediate Past President is a non-voting ex officio member of the Board. The duties of the Immediate Past President will be as agreed between the Immediate Past President and the Board from time to time. Expenses of the Immediate Past President will be reimbursed as approved by the BOG.

## Article 20 Unlawful Practice of Law

### Section 20.1 Definitions

For the purpose of ~~these Rules of Procedure~~ this Article, the following definitions apply:

(A) "Administrator" means the Bar employee assigned to provide administrative support to the Committee and Bar Counsel.

(B) "Committee" means the Unlawful Practice of Law Committee of the Oregon State Bar.

(C) "Unlawful practice of law" means: (1) the practice of law, as defined by the Oregon Supreme Court, in Oregon by a persons who areis not an active members of the Oregon State Bar and areis not otherwise authorized by statute-law to practice law in Oregon; or (2) holding oneself out, in any manner, as authorized to practice law in Oregon when not authorized to practice law in Oregon. do so. It is unlawful for a person who is not an active member of the Bar to engage in the practice of law within the State of Oregon, whether or not for compensation or in connection with any other activity, unless specifically authorized by law or rule. The practice of law includes, but is not limited to, any of the following: Holding oneself out, in any manner, as an attorney or lawyer authorized to practice law in the State of Oregon; appearing, personally or otherwise, on behalf of another in any judicial or administrative proceeding or providing advice or service to another on any matter involving the application of legal principles to rights, duties, obligations or liabilities.

(C) "Documents" includes, but is not limited to, contracts, deeds, mortgages, satisfactions, leases, options, certificates of assumed business name, articles of incorporation and other corporate documents, bulk sales affidavits, wills, trusts, notes and pleadings and other papers incident to legal actions and special proceedings.

(D) "Investigator" means a member of the Unlawful Practice of Law Committee assigned to investigate a complaint of unlawful practice of law.

(E) "Agency" means any federal, state or local agency having an interest in or responsibility for the investigation of ~~acts or~~ conduct that concern or are related to ~~acts or conduct that may represent~~ the unlawful practice of law.

(F) "Accused" means the person or persons who are the subject of a complaint to the ~~C~~ Committee.

(G) "Complaint" means the matter, ~~thing~~ or occurrence that ~~represents a file opened by~~ causes the Committee to open a file for the investigation of ~~anthe~~ the ~~accused's person or~~ any person or activity associated with one or more accused persons under the allegationsalleged unlawful practice of law. ~~contained in a file or any activity related thereto.~~

### Section 20.2 Unlawful Practice of Law Committee

The Board may appoint as many members as it deems necessary to carry out the Committee's functions. At least two members of the Committee must be members of

the general public and no more than one-quarter of Committee members may be lawyers engaged in the private practice of law.

### Section 20.32 Investigative Authority Practices Subject to Investigation

Pursuant to ORS 9.164, the Committee shall investigate complaints of the unlawful practice of law. The Committee may decline to investigate allegations of unlawful practice of law when: the allegations of unlawful practice of law are not made to the Committee in writing; the administrator determines the allegations do not involve the unlawful practice of law, or; the allegations of unlawful practice of law consist only of printed or electronic materials, advertisements or other solicitations describing services that cannot reasonably be construed as legal services. The following conduct by persons who are not members of the Bar is subject to investigation by the Committee, pursuant to ORS 9.164:

- (A) Use of stationery or other written material describing the person as a lawyer.
- (B) Appearance on behalf of another in court or administrative proceedings without statutory authority.
- (C) Correspondence on behalf of another when the correspondence is a jurisdictional prerequisite for legal action or customarily precedes legal action, such as demand letters.
- (D) Negotiation on behalf of another for the settlement of pending or possible legal actions.
- (E) Drafting or selecting documents for another or giving advice to another in regard thereto when informed or trained discretion must be exercised in selecting or drafting a document to meet the needs of another.
- (F) Any exercise of an intelligent choice or informed discretion in advising another of his or her legal rights or duties.
- (G) Representing to the public that the person is authorized to practice law.
- (H) Use of printed or electronic materials, advertisements or other solicitations describing services that can reasonably be construed as legal services.
- (I) Any other action for another that requires legal skill or judgment.

### Section 20.3 Practices Not Subject to Investigation

The Committee may decline to investigate allegations of unlawful practice of law in the following instances: When the allegations of unlawful practice of law are not made to the Committee in writing or when the allegations of unlawful practice of law consist only of printed or electronic materials, advertisements or other solicitations describing services that cannot reasonably be construed as legal services.

### Section 20.4 Practices Subject To Prosecution

The Committee may request the Board to authorize a suit, pursuant to ORS 9.166, to enjoin unlawful practice of law when after investigation by the Committee, it appears that: There is at least one person, identified by the Committee, who has been injured by a person unlawfully practicing law, who has received legal services from a person who is

~~not a member of the Bar or who has personal knowledge of facts constituting the unlawful practice of law or the unlawful practice of law is an ongoing activity; or an accused in any other respect has violated ORS 9.160. The Committee may, at its discretion, for good cause, decline to request authorization from the Board to enjoin the unlawful practice of law pursuant to ORS 9.166 in favor of other resolutions provided in these rules.~~

#### Section 20.5 Practices Not Subject to Prosecution

~~The Committee may, at its discretion, decline to request authorization to enjoin unlawful practice of law pursuant to ORS 9.166 when, after investigation by the committee, it appears that: The unlawful practice of law is not an ongoing activity; the investigator has been unable to obtain sufficient evidence to substantiate the allegation of unlawful practice of law or the investigator has been unable to obtain sufficient evidence to support a suit for injunction pursuant to ORS 9.166. The investigator may, after authorization by vote of a majority of the Committee, conclude an investigation by negotiating an agreement with an accused wherein the accused agrees to discontinue the unlawful practice of law. The agreement will be subject to and not become effective until approval by the Board.~~

#### Section 20.46 Other Investigators

~~The Committee may recommend that the Administrator may hiring a person who is not a member of the Committee to perform further investigation when the Committee determines it is necessary in order to complete the investigation. on consideration of the following factors: The number of persons who have been injured by a person unlawfully practicing law or who have received legal services from a person who is not a member of the Bar; the probable nature and extent of damages to the persons receiving legal services from a person who is not a member of the Bar; the need for additional facts and witnesses to substantiate the allegation of unlawful practice of law for the purpose of a suit for injunction pursuant to ORS 9.166 and the recommendation of the investigator and the Committee's inability to compel discovery whenever it appears that members of the Committee are unable to conduct an appropriate investigation.~~

#### Section 20.57 Processing Unlawful Practice of Law Complaints

##### Subsection 20.7500 Investigation

~~On receiving a complaint of unlawful practice of law meeting the requirements of Section 20.2 of the Bar's Bylaws, the committee chairperson the administrator will assign-give the complaint a case number and assign it to a committee member for investigation. The committee member will review the documentation accompanying the complaint and will contact the complainant, affected parties and witnesses. The committee member may onlynot employ any methods in his or her investigation that do not comply with the Rules of Professional Conduct. Within 60 days after receiving a complaint of unlawful practice of law, Upon completion of the investigation, the~~

investigator will submit a written report to the Committee with an analysis of the relevant facts and law and a recommendation for disposition. ~~The chairperson of the Committee may grant extensions of time to submit a report of investigation as the chairperson deems reasonable.~~

#### Subsection 20.7501 Dispositions

~~Upon receipt and review of the investigator's report, the Committee may either continue the matter for further investigation and revisions to the report or make one of the following dispositions:~~  
~~Actions to be taken at the discretion of the Committee:~~

(a) ~~Closure/Dismissal without prejudice.~~

~~This disposition is appropriate when the Committee has insufficient evidence to prove that the accused did not commit/engaged in the unlawful practice of law. The Committee may reopen a closed matter if it receives additional information or evidence of the unlawful practice of law by the accused.~~

(b) ~~Notice-Informational Letter.~~

~~This disposition is appropriate when the Committee has insufficient evidence facts exist to prove/establish that the accused has committed/engaged in the unlawful practice of law, but the and believes that the accused would benefit from receiving additional information about what the Court has determined constitutes the unlawful practice of law. The letter will notify the accused that the investigation is concluded, and state that the accused may wish to seek legal advice about whether any specific practice constitutes the unlawful practice of law. accused's activities are such that the Committee believes it appropriate to notify the accused of the provisions of ORS 9.160~~

~~(c) Cautionary Letter.~~

~~This disposition is appropriate when the Committee asserts that the accused is engaged in activities involving the unlawful practice of law, but either (1) the practice is neither ongoing nor likely to recur, or (2) the Committee determines that the matter is inappropriate for prosecution.~~

~~(d) Resolution by agreement.~~

~~This disposition is appropriate when the Committee asserts that the accused committed the unlawful practice of law, but is willing to enter into an agreement to discontinue the unlawful practice of law. The agreement is subject to and does not become effective until approved by the Board of Governors.~~

~~(ce) Referral to Board of Governors for prosecution initiation of proceedings under ORS 9.166.~~

~~This disposition (1) Filing suit for civil injunctive relief is appropriate when~~  
~~a) the Committee has clear and convincing evidence to~~  
~~prove/establish/asserts that the accused committed/engaged in the~~  
~~unlawful practice of law, b) the practice is ongoing or likely to recur, and~~  
~~c) a member of the public has been harmed or is likely to be harmed as a~~  
~~result of the accused's unlawful practice of law.~~

(2) Filing suit for contempt relief is appropriate when a) a court has entered an injunction against the accused b) the Committee has clear and convincing evidence to ~~prove~~ establish that the accused continues to engage in the unlawful practice of law and c) a member of the public has been harmed or is likely to be harmed as a result of the accused's unlawful practice of law.

(3) The Committee may decline to request authorization from the Board to initiate proceedings allowed under to ORS 9.166 in favor of other resolutions provided in these rules. ~~the accused is unwilling to enter an agreement to discontinue the unlawful practice of law; or, for any other reason, the Committee concludes that prosecution under ORS 9.166 is warranted.~~

(f) ~~Appointment of Outside Investigator or~~ Referral to or Cooperation with Other Agency or Bar Department.

This disposition is appropriate when the Committee determines that another agency or department is better positioned to investigate or address the complaint, including but not limited to when:

(1) The allegations involve activity prohibited by law, ordinance or statute within the jurisdiction of ~~another a~~ federal, state or local agency;

(2) The accused is or has been the subject of an investigation, action, injunction or review by a federal, state or local agency;

(3) An agency, on review of the allegations before the Committee as to an accused, indicates a desire to pursue further investigation;

(4) The agency has or is likely to have, information regarding the complaint, the accused or parties acting with the accused, or;

(5) The complaint concerns conduct by a lawyer or bar applicant, or implicates the rules of professional conduct. ~~is unable to obtain sufficient information to make an informed recommendation or when the Committee otherwise elects to refer the matter to another investigator or agency.~~

(g) Referral to Bar Counsel

When a complaint of unlawful practice of law involves an accused against whom the Board has already authorized prosecution, the Committee may refer the matter directly to bar counsel without obtaining prior authorization from the Board. Bar counsel may ask the Committee to conduct an investigation into the new complaint and has discretion to determine whether to include the facts alleged in the new complaint in the prosecution against the accused.

Subsection 20.702 Actions of Unlawful Practice of Law Committee

The Committee will consider reports of investigations at its first meeting after submission of a report. On a vote of a majority of members, a quorum being present, the Committee must: Adopt the report as written or modify the report or continue the



~~matter for further investigation and revisions to the report. The committee chairperson must document in writing the Committee's final findings and disposition of each complaint. The chairperson or his or her delegate, must, in writing, inform the complainant and the accused of dismissals without prejudice. A cautionary letter authorized by the Committee gives notice to the accused that the Committee has evidence that the accused is engaged in activities that the Committee maintains involve the unlawful practice of law. The cautionary letter may provide information on the limits of the law and may demand that the accused cease activities that the Committee asserts constitute the unlawful practice of law. On a vote of a majority of members of the Committee, a quorum being present, a complaint of unlawful practice of law must be referred to the Board for authorization to file an action under ORS 9.166.~~

#### Subsection 20.6703 Board of Governors Bar Counsel

##### Subsection 20.600 Role of Bar Counsel

~~On~~After authorization by the Board to pursue an action under ORS 9.166, the ~~Bar~~administrator may ~~obtain~~retain counsel to ~~prosecute~~represent the Bar in the action and will report periodically to the Committee and Board on the status of the litigation. To the extent necessary, the Committee and administrator will assist bar counsel with preparing and continuing investigation of matters approved for action under ORS 9.166.

##### Subsection 20.601 Settlement Authority

After authorization by the Board to pursue an action under ORS 9.166, ~~C~~counsel for the administrator ~~Bar~~ may negotiate a settlement of the unlawful practice litigation before or after the filing of a circuit court complaint by way of agreement with the accused to discontinue the unlawful practice of law. The agreement is subject to and does not become effective until approved by the ~~Board~~Committee. ~~To the extent necessary, the Committee will assist counsel with preparing and continuing investigation of matters approved for action under ORS 9.166.~~

##### Subsection 20.602 Referral to Bar Counsel

When a new complaint of unlawful practice of law involves an accused against whom the Board has already authorized suit, the administrator refer the matter directly to bar counsel without obtaining prior authorization from the Committee or the Board. The administrator and Bar counsel may ask the Committee to conduct an investigation into the new complaint and ~~has~~have discretion to determine whether to include the facts alleged in the new complaint in the prosecution against the accused.

#### Subsection 20.7704 Prevention and Public Outreach and Education

~~The unlawful practice of law statutes cannot be adequately enforced by investigation and prosecution alone. Prevention of unlawful practice of law is also a focus of committee activity. Thus, in addition to the disposition options outlined above, t~~

##### Subsection 20.700 Public Outreach

The Committee may engage in public outreach ~~and education to prevent and to~~ educate the public about the potential harm caused by the unlawful practice of law. The Committee may cooperate in its education efforts with federal, state and local agencies tasked with preventing consumer fraud. Also, when the Committee becomes aware of a person or entity engaged in activities likely to involve the unlawful practice of law based on the Committee's experience, the Committee may send a letter to the person or entity regarding the limits of the law on the provision of legal services.

#### Subsection 20.701 Informal Advisory Opinions

The Committee may ~~also, in its discretion,~~ write informal advisory opinions on questions relating to what activities may constitute the practice of law. Opinions must be approved by the Board before publication. The published ~~Such~~ opinions are not binding, but are intended only to provide general guidance to lawyers and members of the public about activities that ~~may be of concern to or investigated by the Committee Oregon Supreme Court precedent and Oregon law indicate may constitute the unlawful practice of law. All such opinions must be approved by a majority vote of the Committee and submitted to the Board of Governors for final approval prior to publication.~~

#### Subsection 20.~~8705~~ Records

When the investigation of a complaint is concluded, the investigator must deliver all records and documents created or obtained in the investigation to the Bar. Records will be kept in accordance with the Bar's record retention policy.

#### Subsection 20.706 Other Agencies

~~The Committee may refer to, cooperate with or consult other agencies whether federal, state or local having an interest in the subject matter of any complaint before the Committee or having information or resources that would benefit the Committee's investigation. Referral to, joint prosecution with or requests for information or investigation are appropriate under circumstances that include, but are not limited to the following:~~

~~(a) When the allegations concerning a claim of unlawful practice of law would also support or form a part of an activity prohibited by law, ordinance or statute; whether civil or criminal and recognized as a responsibility of the applicable federal, state or local agency.~~

~~(b) When the person accused of the unlawful practice of law or a person acting with the accused, is or has been the subject of an investigation, action, injunction or other similar review by a federal, state or local agency and the matter complained of relates directly or indirectly to the matter, person or activity reviewed or investigated.~~

~~(c) Whenever an agency, on review of the allegations before the Committee as to an accused, indicates a desire to pursue further investigation alone or in combination with the Bar.~~

~~(d) Whenever the agency has or is likely to have, information regarding the complaint, the accused or parties acting with the accused.~~

## EXECUTIVE SUMMARY

The Oregon State Bar International Trade in Legal Services Task Force (“ITLS Task Force”) was tasked with reviewing regulations relating to the practice of law in Oregon to determine whether any “unnecessary barriers to trade” exist in contravention of free trade agreements to which the United States is a party.

The ITLS Task Force concludes as follows:

1. The current Admission Rule for House Counsel arguably stands as an unnecessary barrier to trade. It severely restricts the ability of foreign-licensed lawyers from being admitted to practice as house counsel in Oregon without any apparent consumer protection reasons.
2. Oregon RPC 8.5 determines when the Oregon RPCs should apply, as opposed to the rules of another jurisdiction, when the conduct at issue involves lawyers, clients or legal matters from multiple jurisdictions. Its application in the context of assessing conflicts of interests is particularly complicated and problematic in transnational practice.
3. The foreign legal consultant rule appears to be under-utilized, but the reasons are unclear. More information on this issue is needed.

The ITLS Task Force recommends:

1. Amend Oregon Supreme Court Admission Rule for House Counsel. Rules relating to admission may be formulated by either the Board of Governors or the Board of Bar Examiners, but ultimately must be adopted by the Oregon Supreme Court. See ORS 9.542. Prior to proposing this amendment, the Board may want to solicit comments from the membership, the Board of Bar Examiners, the Professional Liability Fund and any other stakeholders identified by the Board.
2. Direct the Legal Ethics Committee to formulate a formal ethics opinion that provides guidance in interpreting RPC 8.5, specifically, to make it clear that for conflict of interest purposes, when determining the “predominant effect” of transactional work under ABA Model Rule 8.5(b)(2), a lawyer can reasonably take into account an agreement entered into with the client’s “informed consent.”
3. Collect and monitor information about utilization of the foreign legal consultant rule and the barriers that exist to its utilization.

Memo Re: Request for OSB Sponsorship of District of Oregon Conference 2015

For June 2015 BOG Meeting, Ashland

Presented by John Mansfield, D. Or. Ninth Circuit Representative

**Background:**

The US District Court for the District of Oregon is hosting its bi-annual District Conference on October 2, 2015 at OMSI. As a Ninth Circuit representative for the District, I am helping to organize this conference, entitled: "Navigating Complex Problems in Oregon & Beyond."

The District Conference is a statewide event with topics of interest to a wide variety of OSB members, as seen in the overview and tentative agenda attached to this memo. The majority of the speakers at the conference are from Oregon, but there is significant national presence as well. The 2013 Conference had an active twitter feed that was picked up worldwide. The 2013 Conference had approximately 300 attendees, and we expect the same turnout this year.

**Proposed Action:**

I propose that the OSB be a silver sponsor of the District Conference, at the \$1000 level. A chart setting out the various sponsorship levels and benefits for each level is attached.

Such a sponsorship is appropriate for the OSB, and will benefit the OSB and its members. The conference is a premiere statewide event, put on by the District Court for all members of the OSB, including practitioners and judges. Although the annual tradition of OSB Conferences was discontinued before I joined the OSB, I am told that this District Conference is the closest thing to a statewide meeting of Oregon lawyers that we now have. It is an excellent opportunity for the OSB to show its connection to its membership, and its interest in the topics that will be discussed during the Conference.

I will be happy to answer any questions BOG or staff members have at our Ashland open session.

## ATTACHMENT: OVERVIEW AND AGENDA

### 1. Conference Theme:

“Navigating Complex Problems in Oregon & Beyond”

### 2. Keynote Speaker: Garret Epps

### 3. Topics/Speakers:

- a. **Understanding Our Hardwiring** (110 min. Presentation)
  - **Kimberly Papillon**—TheBetterMind.com (expert on implications of neuroscience, psychology and implicit association in medical, legal and judicial decision-making)
- b. **Drought in the American West** (20 min. Pop Talk)
  - **Adele Amos**—University of Oregon
- c. **Things Are A Changin’: What you need to know about where the law and legal profession are headed** (10-12 min. Pop Talks)
  - **Lucy Bassli**—Microsoft (“The Role of In-House Counsel in Transforming the Delivery of Legal Services”)
  - **Dan Lear**—AVVO (How Consumers Are Using the Internet to Find Legal Services)
  - **Judy Perry Martinez**—ABA Commission on Future of Legal Services
- d. **Rollout of New Reentry Technology** (20-30 min. Pop Talk)
  - **Law By Design / Startline**
- e. **Current Issues in Sports Litigation** (55 min. Panel)

Building off the exciting sports moment that Oregon is having with the successes of U of O, the Blazers, and the rise of professional soccer for both men and women, we are presenting a panel about timely sports issues.

- **Ben Laurites**—GM. Trailblazers (moderator)
- **John Casey**—KILL Gates (concussion litigation)
- **Maureen Weston**—Pepperdine Prof. (*O’Bannon* and student athlete likeness, IP issues)
- **Carol Pratt**—KILL Gates (Title IX)
- **Paul Loving**—The Consul Group (Branding issues)
- **Matt Levin**—Markowitz

f. **Law in the New Economy** (Pop Talks—no more than 30 min total)

Adapting to a world of crowd-sourced and virtual services.

- Curb--Bethany
- Umber--Chris
- Virtual Currency—Kristen
- Car-2-Go—Bethany
- Airing, etc.—Gosia, Reilly

h. **Judicial Game Show**

- A panel to get to know the judges better and address some substantive practice issues in a lighthearted, entertaining way.

4. **Potential Agenda**

|             |   |
|-------------|---|
| 8:00-8:30   | Registration  |
| 8:30-8:35   | Welcome by J. Aiken   |
| 8:35-9:10   | Our Changing Profession pop talks                                       |
| 9:10-9:40   | Re-Entry App Rollout  |
| 9:40-10:10  | Addiction Topic   |
| 10:10-10:20 | BREAK   |
| 10:20-10:40 | Drought in the American West  |
| 10:40-11:30 | Law & the New Economy / Crim Law Topic<br>(maybe do break-out sessions) |
| 11:30-12:00 | Garret Epps   |
| 12:00-1:00  | LUNCH   |
| 1:00-1:55   | Sports Law Panel  |
| 1:55-3:00   | Kimberly Papillon   |
| 3:00-3:10   | BREAK   |
| 3:10-4:00   | Kimberly Papillon   |
| 4:00-4:55   | Judicial Game Show  |

4:55-5:00

Closing Remarks by J. Aiken

5:00-6:30

Cocktail Reception

DRAFT

# 2015 District Conference For the U.S. District Court of Oregon

Thursday, October 1, 2015

5:00 to 6:30 p.m.

Speakers and Honored Guests Reception

Mark O. Hatfield U.S. Courthouse

Friday, October 2, 2015

9:00 a.m. to 5:00 p.m.

Navigating Complex Problems in Oregon & Beyond

OMSI – Oregon Museum of Science and Industry

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You are invited to join the Oregon Federal Bar Association (FBA) in sponsoring this wonderful event.

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| Recognition in FBA On-Line Media   | ✓                                   | ✓                                    | ✓                      | ✓                        | ✓                       |

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** June 26, 2015  
**Memo Date:** June 12, 2015  
**From:** Danielle Edwards, Director of Member Services  
**Re:** Appointments to committees and boards

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### Action Recommended

The following bar groups have vacant seats. Consider appointments to these groups as requested by the committee officers and staff liaisons.

### Background

#### Advisory Committee on Diversity and Inclusion

One member resigned from the ACDI and the officers and staff recommend the appointment of **Yazmin Wadia** (141244). Ms. Wadia was an OLIO student and offers the perspective of a newly licensed practitioner to the committee.

**Recommendation:** Yazmin Wadia, member, term expires 12/31/2017

#### Judicial Advisory Committee

The committee has three vacant seats but wishes to only recommend one candidate for appointment at this time. **Phillip Aaron Spicerkuhn** (106750) has agreed to serve if appointed and brings geographic diversity to the committee based on his practice in Hermiston.

**Recommendation:** Phillip Aaron Spicerkuhn, member, term expires 12/31/2016

#### Disciplinary Board

Due to a resignation, one additional non-lawyer member is needed on the region 5 board. Staff recommends the appointment of **Janet L. Fiel**. The experience Ms. Fiel brings as a certified mediator and prior community service make her a qualified candidate to serve on the board.

**Recommendation:** Janet L. Fiel, public member, term expires 12/31/2017

**Oregon State Bar**  
**Special Open Session of the Board of Governors**  
**July 24, 2015**  
**Notes – No Quorum**

President Richard Spier called the meeting to order at 12:00 p.m. on July 24, 2015. The meeting adjourned at 1:50 p.m. Members present from the Board of Governors were Jim Chaney, Guy Greco, Theresa Kohlhoff, Vanessa Nordyke, Ramón A. Pagán, Kathleen Rastetter, Kerry Sharp, Michael Levelle, Tim Williams and Elisabeth Zinser. Not present was Ray Heysell, John Mansfield, Audrey Matsumonji, Per Ramfjord, Travis Prestwich, Josh Ross and Charles Wilhoite. Staff present were Sylvia Stevens, Susan Grabe, Dawn Evans, Amber Hollister, Jennifer Walton, Paul Nickell and Camille Greene. Also present was: PLF BOD Member Robert Newell and PLF Director of Administration Jeff Crawford; Legal Heritage Interest Group representatives Janet Kreft, Katherine O’Neil, Mary Anne Anderson and Rachel Hull; and OWLs members Elizabeth Milesnick, Maya Crawford and Heather Weigler.

**1. Call to Order**

Mr. Spier called the meeting to order and welcomed new BOG member Michael Levelle. There was no quorum.

**2. Member’s Room at OSB Center**

Mr. Spier welcomed feedback from several members regarding the plan to repurpose the Member’s Room to accommodate the needs of nursing mothers who visit the OSB Center. Ms. Kreft and Ms. Hull asked the board to keep the current Members Room intact and let the Legal Heritage Interest Group work with the Executive Director to find a mutually agreeable solution. Ms. Milesnick, Ms. Crawford and Ms. Weigler presented arguments in support of a proper lactation room at the bar center stating it would be used frequently.

**Motion:** Ms. Kohlhoff moved, Mr. Sharp seconded, that the bar remodel the Members’ Room to accommodate nursing mothers, but keep the current furniture. After discussion by the board, Ms. Kohlhoff withdrew her motion and Mr. Sharp agreed.

**Motion:** Mr. Pagán moved, Mr. Cheney seconded, that the bar work with the Legal Heritage Interest Group to repurpose the room while maintaining the “traditional office” feel of the room. The vote, for presentation and possible ratification at the September 11, 2015 board meeting, passed 6-5. Voting in favor: Theresa Kohlhoff, Vanessa Nordyke, Jim Cheney, Kathleen Rastetter, Ramón A. Pagán and Tim Williams. Opposed: Rich Spier, Guy Greco, Elizabeth Zinser, Michael Levelle and Kerry Sharp.

**3. New Executive Director’s Contract**

Mr. Spier presented the draft contract and asked the board for approval to change the term to two years from one year and to offer severance pay for termination without cause of six months or for the remaining term of the contract, whichever is less. Ms. Zinser stated that salary increases should be determined by the board and not quantified in the contract.

No motion was made. Mr. Spier and Ms. Stevens will present the contract to Ms. Hirschbiel and will report to the board at the September 11, 2015 board meeting.

#### **4. Budget Discussion**

Ms. Kohlhoff led the discussion regarding the 2016, and subsequent budgets, and the need to either raise fees or reduce programs and services. She urged the board to undertake a professional poll to determine what programs members' value and would be willing to pay more to keep. After considerable discussion, the board agreed that its consideration of the polling would be assisted by seeing what data the bar already has regarding program utilization. Ms. Stevens will also work with Ms. Kohlhoff to identify appropriate polling services.

#### **5. Approve Co-Sponsorship of CEJ Call to Action**

Ms. Stevens presented the CEJ's request that the BOG sign on to CEJ's Call to Action. **[Exhibit A]**

**Motion:** Mr. Cheney moved, Ms. Rastetter seconded, and the board voted unanimously to sign on to the CEJ's Call to Action. The vote will be presented and possibly ratified at the September 11, 2015 board meeting.

DRAFT

# Learn. Speak Up. Act.

- **Give** to the Campaign for Equal Justice. The best way to increase access is to create more legal aid staff attorney positions.
- **Volunteer** through one of legal aid's many volunteer lawyer projects and clinics, or help the Campaign for Equal Justice raise money for legal aid.
- **Learn** how legal aid services are delivered in your community so that you can make appropriate referrals for low-income clients.
- **Move** your IOLTA accounts to a "Leadership Bank." If all lawyers took this step, funding for legal aid could increase by as much as \$700,000—enough to fund two small rural legal aid offices. Contact the OLF at [www.oregonlawfoundation.org](http://www.oregonlawfoundation.org).
- **Review** your IOLTA account for abandoned client funds. The funds are paid to the Oregon State Bar for appropriation to legal aid through the Oregon State Bar's Legal Services Program.
- **Educate.** Be a walking PSA (Public Service Announcement) for legal aid and CEJ. Proudly wear a "fact" button about legal aid to help spark conversations about the importance of access to justice.
- **Endow.** Take simple steps to endow your annual gift to the Campaign's endowment fund.
- **Speak Up.** Let state, federal and private funders know that access to justice is important.
- **Connect.** Ask your bar group to take action to support statewide legal aid programs in Oregon. Contact the CEJ for ideas.
- **Shop.** Support legal aid when you shop at Fred Meyer or Amazon. It costs you nothing, but supports legal aid.

- FOR MORE INFORMATION ON HOW YOU CAN BE INVOLVED ●  
CONTACT THE CAMPAIGN FOR EQUAL JUSTICE.

[WWW.CEJ-OREGON.ORG](http://WWW.CEJ-OREGON.ORG)

503.295.8442

**OREGON STATE BAR**  
**Client Security - 113**  
**For the Seven Months Ending July 31, 2015**

| Description                          | July<br>2015    | YTD<br>2015      | Budget<br>2015 | % of<br>Budget | July<br>Prior Year | YTD<br>Prior Year | Change<br>v Pr Yr |
|--------------------------------------|-----------------|------------------|----------------|----------------|--------------------|-------------------|-------------------|
| <b>REVENUE</b>                       |                 |                  |                |                |                    |                   |                   |
| Interest                             | \$542           | \$3,050          |                |                | \$274              | \$1,246           | 144.8%            |
| Judgments                            |                 | 600              | 1,000          | 60.0%          | 50                 | 650               | -7.7%             |
| Membership Fees                      | 990             | 659,501          | 693,500        | 95.1%          | 1,305              | 658,094           | 0.2%              |
| <b>TOTAL REVENUE</b>                 | <b>1,532</b>    | <b>663,151</b>   | <b>694,500</b> | <b>95.5%</b>   | <b>1,629</b>       | <b>659,990</b>    | <b>0.5%</b>       |
| <b>EXPENSES</b>                      |                 |                  |                |                |                    |                   |                   |
| <b>SALARIES &amp; BENEFITS</b>       |                 |                  |                |                |                    |                   |                   |
| Employee Salaries - Regular          | 3,897           | 19,692           | 32,600         | 60.4%          | 3,304              | 17,917            | 9.9%              |
| Employee Taxes & Benefits - Reg      | 1,188           | 6,517            | 11,900         | 54.8%          | 1,264              | 6,860             | -5.0%             |
| <b>TOTAL SALARIES &amp; BENEFITS</b> | <b>5,084</b>    | <b>26,209</b>    | <b>44,500</b>  | <b>58.9%</b>   | <b>4,568</b>       | <b>24,777</b>     | <b>5.8%</b>       |
| <b>DIRECT PROGRAM</b>                |                 |                  |                |                |                    |                   |                   |
| Claims                               | 45,000          | 65,532           | 250,000        | 26.2%          | 3,100              | 18,044            | 263.2%            |
| Collection Fees                      |                 | 93               | 1,500          | 6.2%           | 541                | 865               | -89.2%            |
| Committees                           | 42              | 42               | 250            | 16.9%          |                    |                   |                   |
| Travel & Expense                     | 1,170           | 1,760            | 1,400          | 125.7%         | 400                | 1,123             | 56.8%             |
| <b>TOTAL DIRECT PROGRAM EXPENSE</b>  | <b>46,212</b>   | <b>67,428</b>    | <b>253,150</b> | <b>26.6%</b>   | <b>4,041</b>       | <b>20,031</b>     | <b>236.6%</b>     |
| <b>GENERAL &amp; ADMINISTRATIVE</b>  |                 |                  |                |                |                    |                   |                   |
| Office Supplies                      |                 |                  | 150            |                |                    |                   |                   |
| Photocopying                         |                 | 5                | 50             | 9.6%           |                    | 34                | -86.0%            |
| Postage                              | 10              | 109              | 300            | 36.3%          | 62                 | 184               | -40.8%            |
| Professional Dues                    |                 | 200              | 200            | 100.0%         |                    | 200               |                   |
| Telephone                            | 22              | 188              | 150            | 125.0%         |                    | 41                | 361.5%            |
| Training & Education                 |                 |                  | 600            |                |                    |                   |                   |
| Staff Travel & Expense               | 424             | 734              | 974            | 75.4%          | 478                | 478               | 53.7%             |
| <b>TOTAL G &amp; A</b>               | <b>457</b>      | <b>1,235</b>     | <b>2,424</b>   | <b>51.0%</b>   | <b>540</b>         | <b>937</b>        | <b>31.9%</b>      |
| <b>TOTAL EXPENSE</b>                 | <b>51,754</b>   | <b>94,872</b>    | <b>300,074</b> | <b>31.6%</b>   | <b>9,149</b>       | <b>45,744</b>     | <b>107.4%</b>     |
| <b>NET REVENUE (EXPENSE)</b>         | <b>(50,222)</b> | <b>568,279</b>   | <b>394,426</b> |                | <b>(7,520)</b>     | <b>614,246</b>    | <b>-7.5%</b>      |
| Indirect Cost Allocation             | 2,527           | 17,689           | 30,319         |                | 1,357              | 9,499             | 86.2%             |
| <b>NET REV (EXP) AFTER ICA</b>       | <b>(52,749)</b> | <b>550,590</b>   | <b>364,107</b> |                | <b>(8,877)</b>     | <b>604,747</b>    | <b>-9.0%</b>      |
| Fund Balance beginning of year       |                 | 619,965          |                |                |                    |                   |                   |
| <b>Ending Fund Balance</b>           |                 | <b>1,170,555</b> |                |                |                    |                   |                   |

| CLAIM year | CLAIM No. | CLAIMANT   | LAWYER                   | CLAIM AMT       | PENDING         | INVESTIGATOR | STATUS  |
|------------|-----------|--|--------------------------|-----------------|-----------------|--------------|---|
| 2013       | 24        | Mantell, Elliott J   | Goff, Daniel             | \$ 47,609.00    | \$ 47,609.00    | Davis        | CSF Denied 11/16/13 Appealed May 2015. Pending. |
| 2013       | 36        | Chaves Ramirez, Aquilino   | McBride, Jason           | \$ 2,600.00     |                 | Angus        | \$2600 ck mailed 04/09/15 see 2013-37           |
| 2013       | 37        | Martinez, Maria  | McBride, Jason           | \$ -            |                 | Angus        | \$0 ck mailed 04/09/15 see 2013-36              |
| 2013       | 42        | Meier-Smith, Mary  | Hall, C. David           | \$ 27,500.00    | \$ 27,500.00    | Brown        |   |
| 2014       | 2         | Kitchen, Kimberly A.   | Wood, Alan K.            | \$ 3,000.00     | \$ 3,000.00     | Raher        | copies of claim to Raher 1/27/15                |
| 2014       | 14        | Plancarte, Gladys for Pedro Lagunas Do                                   | McBride, Jason           | \$ 1,300.00     | \$ 1,300.00     | not assigned | wait for info from claimant 04/11/14            |
| 2014       | 15        | Soto-Santos, Armando   | McBride, Jason           | \$ 5,000.00     | \$ -            | Atwood       | \$3500 check mailed 4/3/15                      |
| 2014       | 16        | Dickinson, Bruce   | Stevens, Randolph J.     | \$ 1,500.00     | \$ -            | Timmons      | \$1167.46 check mailed 1/29/15                  |
| 2014       | 18        | Crocker, Suzanne   | McCarthy, Steven M.      | \$ 1,500.00     | \$ 1,500.00     | Butterfield  | CSF Denied 05/16/15                             |
| 2014       | 20        | Pettingill, Lori Lynn  | Wood, Alan K.            | \$ 4,000.00     | \$ 4,000.00     | Naucler      |   |
| 2014       | 23        | Perez-Paredes, Javier  | McBride, Jason           | \$ 2,500.00     | \$ -            | Atwood       | \$2500 check mailed 4/3/15                      |
| 2014       | 24        | Valdez-Flores, Maria   | McBride, Jason           | \$ 5,000.00     | \$ -            | Atwood       | \$4120 check mailed 4/3/15                      |
| 2014       | 25        | Hassel, Stacey Lee   | Wood, Alan K.            | \$ 1,000.00     | \$ -            | Naucler      | \$1000 ck mailed 06/11/15                       |
| 2014       | 26        | Waller, Tiffany M  | Wood, Alan K.            | \$ 525.00       | \$ -            | Naucler      | \$525 ck mailed 06/04/15                        |
| 2014       | 27        | Gowan, Valerie   | Schannauer, Peter M      | \$ 1,240.00     | \$ -            | Davis        | \$940 ck mailed 5/7/15                          |
| 2014       | 28        | Marquardt, Christina Louise  | Segarra, Francisco       | \$ 1,449.14     | \$ 1,449.14     | Raher        | CSF Denied 05/16/15                             |
| 2014       | 29        | Madera, Benjamin and Irene   | Roller, Dale Maximiliano | \$ 1,500.00     | \$ 1,500.00     | Reinecke     | CSF Denied 05/16/15                             |
| 2014       | 31        | Games, Gary Raymond  | Roller, Dale Maximiliano | \$ 17,000.00    | \$ 17,000.00    | Reinecke     |   |
| 2014       | 32        | Scott, Andrew L.   | Allen, Sara Lynn         | \$ 5,000.00     | \$ 5,000.00     | Bennett      |   |
| 2014       | 33        | Henry, Jennifer Lynn   | Connall, Des & Shannon   | \$ 20,000.00    | \$ 20,000.00    | Davis        | CSF Denied 05/16/15                             |
| 2015       | 1         | Smith, Steven Lee  | Ettinger, Mariel         | \$ 868.50       | \$ -            | Park         | Lawyer paid client. Claim w/drawn 2/9/15.       |
| 2015       | 2         | Miranda, Francisco   | Bertoni, Gary B          | \$ 1,500.00     | \$ 1,500.00     | Bennett      |   |
| 2015       | 3         | Smith, Devin   | Eckrem, John P           | \$ 1,000.00     | \$ -            | Miller       | Lawyer paid client. Claim w/drawn 5/21/15.      |
| 2015       | 4         | Godier, John   | Webb, Sandy N            | \$ 46,000.00    |                 | Thompson     | \$45K Ck mailed 7/9/15                          |
| 2015       | 5         | Foster, Sandra Jean  | Landers, Mary            | \$ 4,012.49     | \$ -            | Malcolm      | \$4180 check mailed 4/3/15                      |
| 2015       | 6         | Hernandez, Jose Prado  | Bertoni, Gary B          | \$ 6,591.00     | \$ 6,591.00     | Bennett      |   |
| 2015       | 7         | Koutsopoulos, Stephanie Kay  | Gruetter, Bryan W        | \$ 5,489.50     | \$ 5,489.50     | Miller       |   |
| 2015       | 8         | Husel, Richard C   | Stedman, Michael         | \$ 11,500.00    | \$ 11,500.00    | Braun        |   |
| 2015       | 9         | Moore, Kenneth Wayne   | Gerber, Susan R.         | \$ 5,000.00     | \$ 5,000.00     | Atwood       |   |
| 2015       | 10        | Patapoff, John Paul  | Dickey, Jeffrey Scott    | \$ 7,500.00     | \$ 7,500.00     | Malcolm      |   |
| 2015       | 11        | Huntington, Anthony D.   | Gerber, Susan R.         | \$ 7,000.00     | \$ -            | Braun        | CSF Denied 05/16/15 BOG denied 6/26/15          |
| 2015       | 12        | Avery, James Ray   | Carolan, Kevin           | \$ 3,886.00     | \$ 3,886.00     | Park         |   |
| 2015       | 13        | Hallam, Deborah Lynne  | Cyr, Steven M.           | \$ 20,207.24    | \$ 20,207.24    | Butterfield  |   |
| 2015       | 14        | Lawson, Richard  | Gerber, Susan R.         | \$ 10,000.00    | \$ 10,000.00    | Atwood       |   |
| 2015       | 15        | Roelle, Brian D.   | Gerber, Susan R.         | \$ 9,740.00     | \$ 9,740.00     | Atwood       |   |
| 2015       | 16        | Lyons, Derrick Lee   | Bertoni, Gary B          | \$ 3,000.00     | \$ 3,000.00     | Bennett      |   |
|            | 17        | Graue, Scott   | Gerber, Susan R.         | \$ 12,500.00    | \$ 12,500.00    | Atwood       |   |
|            | 18        | Chappue, Joseph D.   | Gerber, Susan R.         | \$ 12,800.00    | \$ 12,800.00    | Atwood       |   |
|            | 19        | Lowry, Shaun Dellynn   | Wieselman, Jacob         | \$ 990,000.00   | \$ 50,000.00    | Raher        |   |
|            | 20        | Lipnicki, John   | Daily, Matthew C         | \$ 1,500.00     | \$ 1,500.00     | Naucler      |   |
|            | 21        | Barnes, Gary D.  | Wood, Alan K.            | \$ 4,000.00     | \$ 4,000.00     | Naucler      |   |
|            | 22        | Hernandez, Aracely   | Jordan, Keith            | \$ 7,500.00     | \$ 7,500.00     | Malcolm      |   |
|            | 23        | Ballantyne, Robert   | Smith, Fred T            | \$ 1,500,000.00 | \$ 50,000.00    | Thompson     |   |
|            | 24        | Suazo, Jeanette for son  | Krull, Julie             | \$ 6,600.00     | \$ 6,600.00     | Davis        |   |
|            |           |  |                          |                 | \$ 359,171.88   |              |   |
|            |           | Funds available for claims and indirect costs allocation as of July 2015 | Total in CSF Account     |                 | \$ 1,170,555.00 |              |   |
|            |           |  | Fund Excess              |                 | \$ 811,383.12   |              |   |

Dear Mr. Spier,

I want to thank you for taking time out of your busy schedule to attend OUCO 2 weeks ago & to attend orientation at Willamette last week. As a 1L, I find the resources of the Oregon State Bar invaluable & I honestly would not have known about them had you not been present to inform my peers & I about them. I can see why members of our legal community chose you to represent them! Thank you again!

Best,  
Melina Peltier

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**Executive Director**

Sylvia Stevens, Tigard

August 4, 2015

Ellen Johnson, Chair, Board of Trustees  
Metropolitan Public Defender Services, Inc.  
630 SW Fifth, Suite 500  
Portland, OR 97204-1498

Re: Oregon State Bar Appointment to Board of Trustees for  
Metropolitan Public Defender

Dear Ms. Johnson,

As President of the Oregon State Bar, I hereby appoint Mr. Whitney Boise to the Metropolitan Public Defender's Board of Trustees for a term expiring June 30, 2018, to replace Mr. Stephen House who has resigned his position on the Board.

Sincerely,



Richard G. Spier, President

cc: Lane Borg, Executive Director, MPD



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Kerry L. Sharp, Lake Oswego

Charles A. Wilhoite, Portland

Elisabeth Zinser, Ashland

**Executive Director**

Sylvia Stevens, Tigard





## Are new Oregon lawyers among the 'dumbest' in the country?

lionel\_hutz\_simpsons\_fox.jpg.jpeg

Doh! "Simpsons" lawyer Lionel Hutz would have an easier time getting into law school these days. (*Fox*)

**Douglas Perry | The Oregonian/OregonLive** By **Douglas Perry | The Oregonian/OregonLive**

**Email the author | Follow on Twitter**

on August 20, 2015 at 8:21 AM, updated August 20, 2015 at 9:46 AM

This is a tough time to be a lawyer, and so it's never been easier to become a law student. The result, wrote the National Conference of Bar Examiners: law-school graduates are "less able" than their predecessors.

That was putting it politely.

2014's July bar-exam scores in the multiple-choice section were almost apocalyptic. **Wrote BloombergBusiness this week:** "By the time all the states published their numbers, it was clear that the July exam had been a disaster everywhere. Scores on the multiple-choice part of the test registered their largest single-year drop in the four-decade history of the test."

The Bloomberg headline didn't pull its punch. "Are lawyers getting dumber?" it asked. "Yes, says the woman who runs the bar exam."

Oregon is one of six states where scores dropped 9 percentage points or more on the multiple-choice part of the bar exam. The others are Delaware, Idaho, Iowa, Tennessee and Texas.

Idaho suffered the worst drop: 15 percentage points.

Law schools reacted with fury to the results. Seventy-nine law-school deans demanded an investigation into the "integrity and fairness of the July 2014 exam."

But the problem, it seems, was not the test but the test takers.

The terrible bar-exam results are an outgrowth of the Great Recession, BloombergBusiness writes. Jobs for lawyers dried up, even more so than jobs in other prestige white-collar professions. As a result, applications to law schools plummeted. Many law schools -- especially lower-tier schools -- responded by admitting students with "worse credentials."

The economy has been slowly improving in recent years, but that doesn't necessarily mean law students will get better any time soon. So far the lure of a law degree has not returned.

"In 2014," **reported Time magazine**, "law school enrollments bottomed-out to their lowest in 40 years."

-- Douglas Perry

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## Students who pass the bar exam deserve our congratulations: Letters to the Editor

**Letters to the editor** By **Letters to the editor**

on August 24, 2015 at 9:47 AM

**Bar exam: Douglas Perry** questions whether new Oregon lawyers are the "dumbest" in the country. Perry's premise that a lower bar exam pass rate produces less capable lawyers ignores the fact that those who do not pass the exam do not become lawyers. His article accurately states that the overall pass rate on the Oregon bar exam dropped in July 2014, following a national trend. However, the **Oregon State Bar** has employed the same high standards for passage of the exam since the current format of the exam was instituted in 1972. Hence, the students who passed the exam, and the additional requirements for admission, have met a high bar and deserve our congratulations.

Because of the sensitive nature of the work that lawyers do, and the high stakes for clients, a license to practice law in Oregon is both an honor and a privilege. The public must have faith that the minimum standards for that license remain rigorous. The OSB is committed to maintaining those high standards and then supporting new lawyers' continued growth as they transition into the profession.

**Richard Spier**

Tigard

*Spier is president of the Oregon State Bar.*

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IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Amendment to the ) ORDER NO. 15-031  
OREGON STATE BAR RULES )  
OF PROCEDURE ) ORDER AMENDING  
) BAR RULE OF  
) PROCEDURE 8.6

At its public meeting on July 21, 2015, the court considered and approved amendments to Bar Rule of Procedure 8.6. The amendment will eliminate the requirement that lawyers seeking reinstatement must pay (in addition to the reinstatement fee, current year fees, and any outstanding discipline cost bills or obligations to the Client Security Fund) inactive membership fees for each year that the applicant was inactive. The rule, as amended, is set out below. Deleted text is in brackets and italicized:

**Rule 8.6 Other Obligations Upon Application.**

(a) Financial Obligations. Each applicant under BR 8.1 through 8.5 shall pay to the Bar, at the time the application for reinstatement is filed, all past due assessments, fees and penalties owed to the Bar for prior years, and the membership fee and Client Security Fund assessment for the year in which the application for reinstatement is filed, less any active or inactive membership fees or Client Security Fund assessment paid by the applicant previously for the year of application. [*Each applicant under BR 8.1(a)(i), BR 8.1(a)(viii), BR 8.2(a)(i), BR 8.2(a)(iii) or BR 8.2(a)(iv) shall also pay to the Bar, at the time of application, an amount equal to the inactive membership fee for each year the applicant remained suspended or resigned and for which no membership fee has been paid.*] Each applicant shall also pay, upon reinstatement, any applicable assessment to the Professional Liability Fund.

IT IS HEREBY ORDERED that the proposed amendments to Bar Rule of Procedure 8.6 be approved.

Dated this 10<sup>th</sup> day of August, 2015.



Thomas A. Balmer  
Chief Justice

## Sylvia Stevens

---

**From:** Helen Hierschbiel  
**Sent:** Wednesday, July 22, 2015 9:10 AM  
**To:** Sylvia Stevens  
**Subject:** FW: Seeking reprint permission

FYI



**Helen Hierschbiel**  
General Counsel  
503-431-6361  
[HHierschbiel@osbar.org](mailto:HHierschbiel@osbar.org)

Oregon State Bar • 16037 SW Upper Boones Ferry Road • PO Box 231935 • Tigard, OR 97281-1935 • [www.osbar.org](http://www.osbar.org)

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---

**From:** Helen Hierschbiel  
**Sent:** Wednesday, July 22, 2015 9:09 AM  
**To:** 'Steve.A.TODD@ojd.state.or.us'  
**Cc:** Amber Hollister; Karen Lee; Kateri Walsh; Mariann Hyland; 'Melvin Oden-Orr'  
**Subject:** RE: Seeking reprint permission

Thanks so much, Judge Todd. I agree that we have outstanding staff here at the OSB. It's nice to hear confirmation from the members!



**Helen Hierschbiel**  
General Counsel  
503-431-6361  
[HHierschbiel@osbar.org](mailto:HHierschbiel@osbar.org)

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---

**From:** [Steve.A.TODD@ojd.state.or.us](mailto:Steve.A.TODD@ojd.state.or.us) [<mailto:Steve.A.TODD@ojd.state.or.us>]  
**Sent:** Tuesday, July 21, 2015 7:18 PM  
**To:** Helen Hierschbiel  
**Cc:** Amber Hollister; Karen Lee; Kateri Walsh; Mariann Hyland; Melvin Oden-Orr  
**Subject:** RE: Seeking reprint permission

Thanks ! I can't believe how fast this happened.

I never cease to be amazed with the great job the OSB staff gets done. Wow.

Give them all a raise. Even if it means raising my dues.

Steve

Steven A. Todd  
Multnomah County Circuit Court Judge Pro Tem  
1021 SW Fourth Avenue  
Portland, OR 97204-1123  
(503) 988-8093  
[Steve.A.Todd@ojd.state.or.us](mailto:Steve.A.Todd@ojd.state.or.us)  
FAX (503) 276-0984

▼ Helen Hierschbiel ---07/21/2015 10:46:25 AM---Yes, please. [\[cid:image001.gif@01D0C3A2.6B8A04F0\]](#)Helen Hierschbiel

From: Helen Hierschbiel <[HHierschbiel@osbar.org](mailto:HHierschbiel@osbar.org)>  
To: Amber Hollister <[ahollister@osbar.org](mailto:ahollister@osbar.org)>, Kateri Walsh <[kwash@osbar.org](mailto:kwash@osbar.org)>,  
Cc: Karen Lee <[KLee@osbar.org](mailto:KLee@osbar.org)>, "Steve.A.TODD@ojd.state.or.us" <[Steve.A.TODD@ojd.state.or.us](mailto:Steve.A.TODD@ojd.state.or.us)>  
Date: 07/21/2015 10:46 AM  
Subject: RE: Seeking reprint permission

Yes, please.



Helen Hierschbiel

General Counsel

503-431-6361

[HHierschbiel@osbar.org](mailto:HHierschbiel@osbar.org)

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**From:** Amber Hollister  
**Sent:** Tuesday, July 21, 2015 10:24 AM  
**To:** Kateri Walsh; Helen Hierschbiel  
**Cc:** Karen Lee; 'Steve.A.TODD@ojd.state.or.us'  
**Subject:** RE: Seeking reprint permission

Helen,

This agreement looks fine to me. Do you want me to sign?



Amber Hollister

Deputy General Counsel

503-431-6312

[ahollister@osbar.org](mailto:ahollister@osbar.org)

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**From:** Kateri Walsh  
**Sent:** Tuesday, July 21, 2015 9:28 AM  
**To:** Helen Hirschbiel; Amber Hollister  
**Cc:** Karen Lee; 'Steve.A.TODD@ojd.state.or.us'  
**Subject:** FW: Seeking reprint permission

Good morning Helen and Amber.

CLE wants to reprint an Oregonian article for a program this Friday. OK to sign the attached agreement?



**Kateri Walsh**  
Director, Media Relations  
Director, New Lawyer Mentoring Program  
503-431-6406  
[kwash@osbar.org](mailto:kwash@osbar.org)

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**From:** Therese Bottomly [<mailto:tbottomly@oregonian.com>]  
**Sent:** Tuesday, July 21, 2015 9:18 AM  
**To:** Kateri Walsh  
**Cc:** 'Steve.A.TODD@ojd.state.or.us'; Karen Lee  
**Subject:** Re: Seeking reprint permission

Here is a permission agreement.

Therese Bottomly  
Director of News  
1500 S.W. First Ave., Suite 400  
Portland, Ore. 97201  
503-221-8434



**The Oregonian** OREGONLIVE  
OREGONIAN MEDIA GROUP

**From:** Kateri Walsh <[kwash@osbar.org](mailto:kwash@osbar.org)>  
**Date:** Tuesday, July 21, 2015 at 8:57 AM  
**To:** The Oregonian <[tbottomly@oregonian.com](mailto:tbottomly@oregonian.com)>  
**Cc:** "'Steve.A.TODD@ojd.state.or.us'" <[Steve.A.TODD@ojd.state.or.us](mailto:Steve.A.TODD@ojd.state.or.us)>, Karen Lee <[KLee@osbar.org](mailto:KLee@osbar.org)>  
**Subject:** Seeking reprint permission

Good morning, Therese. Our continuing education planners would like to use an Oregonian article for a CLE they are hosting this Friday on traffic stops, and are seeking your permission. The article from December (attached) was by Casey Parks regarding development of the *Driving While Black* App. The planners include Judge Steven Todd of Multnomah County, and Karen Lee, Director of OSB CLE Seminars. If you have a moment, would you let them know what may be involved in getting that permission approved? They are finalizing their

materials and hope to have this confirmed by this Thursday 7/23.

They are both copied here. Judge Todd can be reached at (503) 988-8093. Karen Lee is at (503) 431-6382.

Thanks so much. See you soon,

Kateri



**Kateri Walsh**

Director, Media Relations

Director, New Lawyer Mentoring Program

503-431-6406

[kwalsh@osbar.org](mailto:kwalsh@osbar.org)

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# REENTRY & MENTAL HEALTH

- ACTIONTEAM -

RECEIVED

AUG 13 2015

Oregon State Bar  
Executive Director

ADVISORY GROUP  
Teri Robinson  
Lori Lane

August 10, 2015

The Honorable D. Charles Bailey  
Washington County Courthouse  
150 N. 1st Ave, MS 37  
Hillsboro, OR 97124

Dear Judge Bailey:

On January 28, 2015, we met with representatives of Washington County Sheriff's Office and county Mental Health to discuss issues voiced in our enclosed November 2014 letter. Following the meeting, the Sheriff's Office planned to meet with various individuals and agencies, including the courts, to improve treatment of persons with mental health challenges who become involved with the criminal justice system.

At the January meeting, in addition to concerns about treatment while in custody, we raised issues with the legal representation received by our loved ones with mental health needs. Their attorneys lacked understanding of the special needs of their clients, provided less than zealous representation, took months to request competency evaluations, then inaccurately and inadequately interpreted these evaluations, and allowed their clients to remain stuck in the 'revolving door' of the jail and the criminal justice system. We questioned these failures that resulted in longer stays in jail, delays in competency restoration, and harsher sentences.

While the Oregon State Bar requires attorneys to continue legal education, we sought the availability of education specific to representing persons with mental illness who become criminally-involved. With increasing numbers of this population finding themselves involved with the criminal justice system, we feel continuing education specific to representing clients with mental health needs should be required by all attorneys.

We found information in other States including a Handbook for Attorneys Who Represent Persons With Mental Illness, created by Texas Appleseed. A Top Ten list from the handbook is enclosed. The 64-page handbook can be accessed at <https://www.texasappleseed.org/mental-health>

Harris County, Texas, offers a Mental Health Attorney Certification & Training Program designed to "improve the representation of indigent mentally ill defendants by providing criminal defense attorneys with the legal knowledge and skills they need to represent these clients with special needs." Contact person is Floyd L. Jennings, JD, PhD, Harris County Public Defender's Office, and can be reached at 713.274.6701, [Floyd.Jennings@pdo.hctx.net](mailto:Floyd.Jennings@pdo.hctx.net)

Other States have implemented laws that Oregon should adopt. Texas code §16.22, for instance, requires a sheriff to notify a magistrate not later than 72 hours after receiving evidence or a statement that may establish reasonable cause to believe that a defendant committed to the sheriff's custody has a mental illness. The magistrate then orders an examination to determine whether the defendant has a mental illness.

In Portland, the Metropolitan Public Defenders (MPD) offers support for attorneys who represent clients with special needs. Alex Bassos is the Training Director for MPD, has authored Mental Health and Criminal Defense, a manual for defense attorneys and he is a regular speaker on mental health issues.

It is our hope you will find this information helpful as you engage in discussions to improve services in the County. Our plans are to contact the county district attorneys regarding these issues. Hearing your thoughts on these matters would be greatly appreciated.

Respectfully,

Karen James  
Advisory group for ReEntry & Mental Health Action Team

Teri Robinson

Lori Lane

enclosed:

- Harris County Mental Health Attorney Certification & Training Program brochure
- Top Ten Things to Keep In Mind as you Represent a Client with Mental Illness, Texas Appleseed
- Texas Code §16.22
- Action Team letter, 11/25/2014

cc: Pat Garrett, Sheriff; Bill Steele, Chief Deputy; Washington County Sheriff's Office  
● Oregon State Bar Board of Governors Kristin Burke, Washington County Mental Health  
Bob Joondeph, Disability Rights Oregon  
Jennifer Harrington, MPD  
Cheryl Ramirez, Asso. of Oregon Community Mental Health Programs  
Hon. Kirsten E. Thompson; Hon. James L. Fun, Mental Health Court

*Collaboratively advocate to improve services for justice-involved persons with mental illness and their families.*

[remhaction@gmail.com](mailto:remhaction@gmail.com)

# REENTRY & MENTAL HEALTH

- ACTIONTEAM -

November 25, 2014

Pat Garrett, Sheriff  
Washington County  
215 SW Adams, MS 32  
Hillsboro, OR 97123

Dear Sheriff Garrett:

As a group of concerned citizens advocating for improved services for persons with mental illness who are or have been incarcerated, one goal is to reduce recidivism and increase recovery by helping to ensure a seamless transition upon release, with treatment and services for continuum of care.

Recently several of our loved ones with mental illness were incarcerated in the Washington County jail. Our loved ones were clearly decompensating when arrested and, instead of receiving care necessary for someone experiencing a mental health crisis, they were incarcerated in the jail to linger for weeks without treatment, possibly causing irreparable brain damage.

This is unacceptable treatment for people whose 'criminal' acts are a direct result of their mental illness.

We understand HIPAA requirements and the importance of a signed release of information form (ROI); understand that medication is not given in the jail if a person was not taking prescription medication prior to incarceration; and understand the importance of protecting jail staff. However, opportunities to help our loved ones were grossly overlooked by the jail and the court.

As family members, we sought help for our loved ones, but instead experienced the following:

- we were not allowed access to our loved ones due to out-dated jail visitor's list; or because one parent was considered a 'victim', although the parent states categorically this is not the case;
- we could not obtain signed ROIs. Our loved ones were either catatonic, disengaged or delusional, and lacked capacity to comply or sign. Without a signed ROI, jail mental health and medical staff would not provide information about our loved ones to us and/or to their attorneys. However, at the request of one parent, jail mental health did obtain one signed ROI;
- for five years prior to incarceration, a loved one took prescribed medication, but because he stopped taking this medication three months prior to arrest and incarceration, the jail would not administer the medication; another loved one's medication was stopped without explanation, he was also charged for a doctor's visit when no doctor's visit took place;
- brutality and excessive use of force were used by officers during an arrest even when mental illness was known and reported;
- in one case, the judge ordered an *unable to aid and assist* only after a parent appeared at the third court hearing her loved one refused to attend and provided the court with his mental health history. The person in custody has a history with Washington County corrections, Oregon prison system, LukeDorf, and his parent provided his mental health history to the court within days of his arrest. The attorney blamed HIPAA and jail staff for her lack of information about her client.

We must find alternatives to incarcerating persons with mental illness. If our jails and prisons continue to incarcerate this population, we expect the jail to provide hospital-level care; an initial call from a parent or caretaker should automatically generate and obtain a signed ROI from the prisoner; when a person's mental health history deems psychiatric medications are necessary, the jail must have the authority to force medications that are previously known to be effective and have no serious adverse effects. Psychiatric medications can often save a person's brain from further decompensation and save jail staff from complications that arise from untreated severe psychosis due to mental illness.

HIPAA laws have become a convenient excuse. Yet, according to the U.S. Dept. of Health & Human Services, *HIPAA allows a health care provider to communicate with a patient's family, friends, or other persons who are involved in the patient's care. And that in recognition of the integral role that family and friends play in a patient's health care, the HIPAA Privacy Rule allows these routine – and often critical – communications between health care providers and these persons. Where a patient is not present or is incapacitated, a health care provider may share the patient's information with family, friends, or others involved in the patient's care or payment for care, as long as the health care provider determines, based on professional judgment, that doing so is in the best interests of the patient.*

Our loved ones would have benefitted from simple communication.

We understand the daunting task before our jails and prisons as people with mental illness become involved with the criminal justice system. These cases demonstrate the need for a 24/7 community crisis center where people experiencing a mental health crisis can receive immediate care and diversion from incarceration. In past years, family members were well served by Jason Leinenbach, then jail-mental health liaison.

Thank you for your consideration.

Respectfully,

Karen James

Teri Robinson

Lori Lane

Advisory group for ReEntry & Mental Health Action Team

cc: Hon. Kirsten E. Thompson; Hon. James L. Fun, Mental Health Court

Laura O'Neill, NAMI WashCo; Bob Joondeph, Disability Rights Oregon

# TEX CR. CODE ANN. § 16.22 :EXAMINATION AND TRANSFER OF DEFENDANT SUSPECTED OF HAVING MENTAL ILLNESS OR INTELLECTUAL DEVELOPMENTAL DISABILITY

(a)(1) Not later than 72 hours after receiving evidence or a statement that may establish reasonable cause to believe that a defendant committed to the sheriff's custody has a mental illness or is a person with mental retardation, the sheriff shall notify a magistrate of that fact. A defendant's behavior or the result of a prior evaluation indicating a need for referral for further mental health or mental retardation assessment must be considered in determining whether reasonable cause exists to believe the defendant has a mental illness or is a person with mental retardation. On a determination that there is reasonable cause to believe that the defendant has a mental illness or is a person with mental retardation, the magistrate, except as provided by Subdivision

(2) shall order an examination of the defendant by the local mental health or mental retardation authority or another qualified mental health or mental retardation expert to determine whether the defendant has a mental illness as defined by Section 571.003, Health and Safety Code, or is a person with mental retardation as defined by Section 591.003, Health and Safety Code.(2) The magistrate is not required to order an examination described by Subdivision (1) if the defendant in the year preceding the defendant's applicable date of arrest has been evaluated and determined to have a mental illness or to be a person with mental retardation by the local mental health or mental retardation authority or another mental health or mental retardation expert described by Subdivision (1). A court that elects to use the results of that evaluation may proceed under Subsection (c).

(3) If the defendant fails or refuses to submit to an examination required under Subdivision (1), the magistrate may order the defendant to submit to an examination in a mental health facility determined to be appropriate by the local mental health or mental retardation authority for a reasonable period not to exceed 21 days. The magistrate may order a defendant to a facility operated by the Department of State Health Services or the Department of Aging and Disability Services for examination only on request of the local mental health or mental retardation authority and with the consent of the head of the facility. If a defendant who has been ordered to a facility operated by the Department of State Health Services or the Department of Aging and Disability Services for examination remains in the facility for a period exceeding 21 days, the head of that facility shall cause the defendant to be immediately transported to the committing court and placed in the custody of the sheriff of the county in which the committing court is located. That county shall reimburse the facility for the mileage and per diem expenses of the personnel required to transport the defendant calculated in accordance with the state travel regulations in effect at the time.

(b) A written report of the examination shall be submitted to the magistrate not later than the 30th day after the date of any order of examination issued in a felony case and not later than the 10th day after the date of any order of examination issued in a misdemeanor case, and the magistrate shall provide copies of the report to the defense counsel and the prosecuting attorney. The report must include a description of the procedures used in the examination and the examiner's observations and findings pertaining to:

- (1) whether the defendant is a person who has a mental illness or is a person with mental retardation;
- (2) whether there is clinical evidence to support a belief that the defendant may be incompetent to stand trial and should undergo a complete competency examination under Subchapter B, Chapter 46B; and
- (3) recommended treatment.

(c) After the court receives the examining expert's report relating to the defendant under Subsection (b) or elects to use the results of an evaluation described by Subsection (a)(2), the court may, as applicable:

- (1) resume criminal proceedings against the defendant, including any appropriate proceedings related to the defendant's release on personal bond under Article 17.032; or
- (2) resume or initiate competency proceedings, if required, as provided by Chapter 46B or other proceedings affecting the defendant's receipt of appropriate court-ordered mental health or mental retardation services, including proceedings related to the defendant's receipt of outpatient mental health services under Section 574.034, Health and Safety Code.

(d) Nothing in this article prevents the court from, pending an evaluation of the defendant as described by this article:

- (1) releasing a mentally ill or mentally retarded defendant from custody on personal or surety bond; or
- (2) ordering an examination regarding the defendant's competency to stand trial.

Added by Acts 1993, 73rd Leg., ch. 900, Sec. 3.05, eff. Sept. 1, 1994. Amended by Acts 1997, 75th Leg., ch. 312, Sec. 1, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 828, Sec. 1, eff. Sept. 1, 2001; Subsec. (b) amended by Acts 2003, 78th Leg., ch. 35, Sec. 2, eff. Jan. 1, 2004; Subsec. (c)(2) amended by Acts 2003, 78th Leg., ch. 35, Sec. 2, eff. Jan. 1, 2004.

Amended by: Acts 2007, 80th Leg., R.S., Ch. <a target="new"

href="http://www.legis.state.tx.us/tlodocs/80R/billtext/html/SB00867F.HTM">1307</a>, Sec. 1, eff. September 1, 2007.

## **TOP TEN THINGS TO KEEP IN MIND AS YOU REPRESENT A CLIENT WITH MENTAL ILLNESS**

Mental Illness, Your Client and The Criminal Law: A Handbook for Attorneys Who Represent Persons With Mental Illness  
Texas Appleseed, February 2015

**1. MENTAL ILLNESS AND INTELLECTUAL AND DEVELOPMENTAL DISABILITIES ARE NOT THE SAME:** Intellectual or developmental disabilities are permanent conditions characterized by significantly below average intelligence accompanied by significant limitations in certain skill areas, with onset before age 18. Mental illness, on the other hand, usually involves disturbances in thought processes and emotions and may be temporary, cyclical, or episodic. Most people with mental illness do not have intellectual deficits; some, in fact, have high intelligence. It is possible for a person with an intellectual or developmental disability to also have a mental illness. Many of the Texas statutes that address mental illness also address intellectual and developmental disabilities, and you should look carefully at those statutes for the differences in how the two are addressed. This handbook does not address intellectual and developmental disabilities.

**2. YOU OWE YOUR CLIENT A ZEALOUS REPRESENTATION:** You have the ethical obligation to zealously represent your client, which may include exploring your client's case for mental health issues. It may also include bringing appropriate motions if your client's mental illness has affected his or her case in any of the ways discussed in Section 1 of this handbook.

**3. IF YOUR CLIENT IS INCOMPETENT, STOP AND ORDER AN EVALUATION:** If your client is incompetent, he or she may not be able to make informed decisions about fundamental issues, such as whether or not to enter into a plea bargain agreement or, instead, proceed to trial. Do not allow your client to accept a plea bargain, or make any other decisions regarding the case, when you have reason to believe that he or she is incompetent. Instead, immediately request a competency evaluation.

**4. MENTAL ILLNESS AND INCOMPETENCE ARE NOT SYNONYMOUS, AND YOU SHOULD BE CONCERNED ABOUT BOTH:** Keep in mind that competence to stand trial is distinct from mental illness. Some clients who are fit to proceed to trial may still have serious mental illness. Even if your client does not have a competence issue, there may still be significant mental health issues in the case that you should explore. Remember, however, that if your client is competent to stand trial, he or she makes the final decision about how to proceed with the case, whether or not to explore mental health issues, and whether treatment should be part of a disposition.

**5. AN INSANITY DEFENSE MAY BE APPROPRIATE:** By taking the time to properly inquire about your client's mental illness and to explore various legal and medical options, you may obtain information that will help you decide if you should explore an insanity defense. If your client receives a not guilty by reason of insanity verdict, he or she will avoid receiving an unjust conviction. However, as discussed further in Section 7 of this handbook, there may be disadvantages to pursuing the insanity defense, and you should discuss all of the pros and cons with your client.

**6. MITIGATE, MITIGATE, MITIGATE:** Mental conditions that inspire compassion, without justifying or excusing the crime, can be powerful mitigation evidence. Part of your job as an attorney is to present the judge or jury with evidence that reveals your client as someone with significant impairments and disabilities that limit his or her reasoning or judgment. Mitigation evidence can be used to argue for a shorter term of incarceration or for probation instead of

incarceration. In capital cases, mental illness and mental health testimony may mean the difference between life and death.

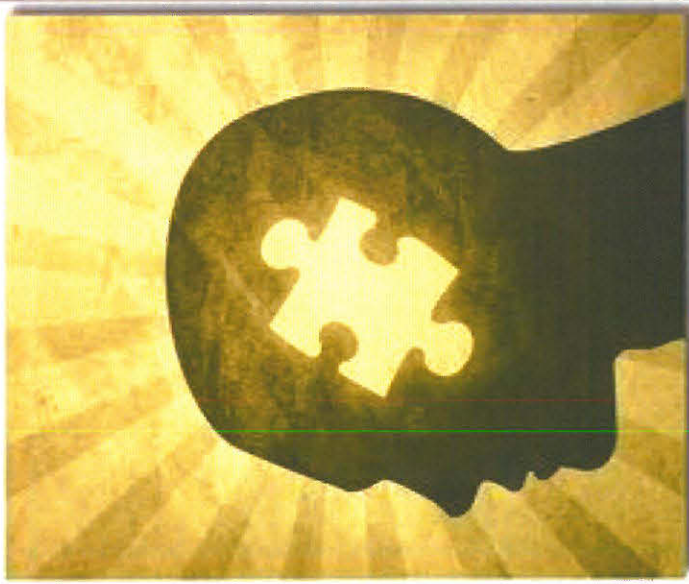
**7. INEFFECTIVE ASSISTANCE OF COUNSEL AND REVERSIBLE ERROR:** An attorney's failure to request the appointment or otherwise obtain the assistance of qualified mental health or mental rehabilitation professionals when indicated can be a violation of a defendant's Sixth Amendment right to effective assistance of counsel. This certainly applies to capital cases but also to other homicide cases and any alleged offense that suggests mental aberration. A defendant's prior history of mental impairment may indicate that you need the assistance of a professional evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* also confirms the right of indigent, convicted defendants to the assistance of mental health professionals at sentencing proceedings. An appellate judge may find reversible error if a client is truly incompetent or insane and the issue is not raised in court.

**8. OVERCOME YOUR OWN PREJUDICES BEFORE YOU HURT YOUR CLIENT AND HIS OR HER CASE:** A popular misconception is that mental-state defenses are attempts by the defendant to "get off" or deny responsibility for their behavior. Many people are skeptical that persons with mental illness, in contrast to those with intellectual and developmental disabilities, are in some circumstances unable to fully appreciate the nature of their acts and control them. This denial of psychiatric disability can deeply influence the attitudes of both judges and juries toward expert witnesses and mental health defenses. Part of your job, if you are representing a person with mental illness, is to overcome cynicism toward mental health issues in criminal cases. Mental illnesses are neurobiological brain diseases. A mental illness is a medical illness, not "hocus pocus," and the people who experience it suffer profoundly. Mental illness can be diagnosed, treated, and sometimes even cured. You do your client a disservice by representing it any other way.

**9. INCARCERATION IS PARTICULARLY HARMFUL TO PEOPLE WITH MENTAL ILLNESS:** Jails can be very damaging to the stability, mental health, and physical health of individuals with mental illness. Numerous studies show that placing mentally ill persons in single cells, isolation, or "lock down" can worsen their schizophrenia, depression, and anxiety. Individuals with mental illnesses or intellectual and developmental disabilities are also more likely than others to be victimized by other inmates or jail staff. They are at high risk for suicide. They may get inadequate, if any, medication and treatment while in jail. As set out in Section 5 of this handbook, you should seek to get your client's case dismissed quickly and, if appropriate, try to get your client released on bond.

**10. DO NOT LET YOUR CLIENT GET CAUGHT IN THE "REVOLVING DOOR":** Many adults with mental illness are arrested for minor offenses that directly relate to their illness, poverty, or disturbed behavior. They cycle repeatedly through the courts and jails, charged with the same petty offenses. This "revolving door" is not only a burden to the courts and the criminal justice system, but it is also costly to society, to these individuals, and to their families. By quickly pleading your client to "time served" without exploring his or her mental illness, you may lose the opportunity to help your client get better so that he or she does not re-offend. Attorneys should do their best to link mentally ill defendants to appropriate treatment or services that will help them keep out of trouble. While it is important to get your client out of jail as soon as possible, it is equally important to keep him or her from returning to jail. Releasing persons with mental illness back into the community with no plan for treatment or aftercare is a recipe for revocation and recidivism. Don't set up your client to fail.

## HARRIS COUNTY MENTAL HEALTH ATTORNEY CERTIFICATION & TRAINING PROGRAM



A PROGRAM FOR PRIVATE  
APPOINTED COUNSEL  
SPONSORED BY THE

**Public  
Defender's  
Office**

Harris County, Texas

## BENEFITS OF THE MENTAL HEALTH ATTORNEY CERTIFICATION & TRAINING PROGRAM

**Attorneys who complete the Mental Health Attorney Certification Program will:**

- Be eligible to receive appointments to represent indigent mentally ill defendants charged with misdemeanors.
- In the future, will be eligible to receive appointments in district courts to represent mentally ill defendants charged with felonies.
- Receive free MCLE that can be applied to annual State Bar MCLE requirements.

**Attorneys who don't want certification but would like to earn free MCLE are welcome to attend any of the trainings as well.**

**For more information contact:**

**Mental Health Liaison Person**

**Harris County  
Public Defender's Office**

Phone | 713.368.0016  
Fax | 713.XXX.XXXX

[www.harriscountypublicdefender.org/mh](http://www.harriscountypublicdefender.org/mh)

## TRAINING TOPICS

Approximately once a month, free MCLE will be provided on such topics as:

- Diagnostic Terminology Related to Mental Illness
- Common Psychoactive Medications and Their Use
- Competency and Tex. Code Crim. Proc. art. 46B
- Standards of Evidence Relating to Competency
- Evaluating Competency Examinations
- Cross-Examination of Mental Health Experts
- Civil Commitment in Texas
- Forced Medication Proceedings
- Not Guilty By Reason of Insanity
- Landmark Cases in Mental Health Law
- Attitudinal Issues in Representing the Mentally Ill

Attendance for MCLE trainings will be required of persons seeking Mental Health Attorney Certification in order to accept appointments to represent mentally ill defendants.

Persons not seeking certification are welcome to attend any MCLE presentations of interest.





LAW



SKILLS



SCIENCE



MEDICINE

## Program Requirements

- Submit an application to join the certification program. DUE Month xx, 2014.
- Attend 12 monthly MCLE programs lasting 1-to-1.5 hours each.
- Pass a written test.

## WANT TO HELP IMPROVE REPRESENTATION OF INDIGENT MENTALLY ILL DEFENDANTS IN HARRIS COUNTY?

**Join Us – And Make a Difference.**

The Harris County Jail is the largest mental health facility in the state of Texas. Approximately 25 percent of inmates in the jail are on some form of psychotropic medication. It's a complex problem that requires a multi-faceted solution.

One way in which Harris County is seeking to reduce the number of mentally ill persons in the jail is by ensuring that defense counsel representing these defendants is well-qualified.

The County recently received a grant from the Texas Indigent Defense Commission to establish a Mental Health Attorney Certification Program.

The program is designed to improve the representation of indigent mentally ill defendants by providing criminal defense attorneys with the legal knowledge and skills they need to represent these clients with special needs.

## Who Should Get Certified?

Harris County's Criminal Courts at Law will soon require indigent defendants with mental illness to be represented by an attorney who has successfully completed this Mental Health Attorney Certification Program. The District Courts are considering doing the same thing.

We are looking for candidates who are:

- Criminal defense attorneys who are qualified to accept appointments in county courts for misdemeanors and who are interested in representing indigent mentally ill defendants should get certified.
- Attorneys who are qualified to accept appointments in district courts and who are interested in representing indigent mentally ill defendants charged with felonies.

## Technology, advent of 'legal techs' present future challenges for lawyers

By Nelson Page

There have been many changes in the practice of law since I first became a lawyer. It has been a long time since I spent an afternoon at a desk lined with hard-bound case reporters, burrowing my way from volume to volume in order to fully digest a legal argument. The last time I needed to find the answer to a legal question I did not even bother to go to my subscription legal research service: I googled the issue and got what I needed in about 30 seconds. When I first began to practice, my clients came from referrals from partners and other colleagues. The very concept of advertising and marketing was foreign, and mostly unethical. Now you can find me on Facebook, LinkedIn, AVVO and who knows where else. Google yourself. Then google some of your colleagues. It is a humbling experience.

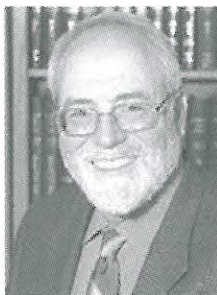
But I have a sense that the delivery of legal services is about to change in ways that are more fundamental than we have ever encountered before. These changes have nothing to do with the evolution from Pacific Digest to Westlaw or from carbon paper to computers. Lawyers may need to entertain the idea that our role as the source of legal advice and representation is no longer unique and perhaps no longer necessary. A growing wave of changes to the way we practice law may well make what we do obsolete, or at least open to serious competition.

In Washington State, for example, the Supreme Court has adopted rules allowing for a new type of le-

gal professional known as the Limited Licensed Legal Technician. An LLLT is a professional paralegal licensed and authorized by the state to engage in what any lawyer would call the practice of law. LLLTs can provide information and advice on legal matters within a defined area of expertise. This includes explaining the relevancy of the laws as they apply to a client's facts, informing and assisting the client in meeting the requirements of a legal proceeding and, under the supervision of a lawyer, drafting documents and performing legal research on behalf of the client.

It has always been true that a paralegal can perform many tasks so long as they have been delegated by a lawyer who is responsible for the ultimate product. But the LLLT concept carries this a step beyond. LLLTs are allowed to engage clients on their own and to have direct and ultimate professional responsibility to a client. If the Washington State experiment succeeds, we may find ourselves facing a whole new type of competition.

Other changes are coming. The Alaska Bar Association already has an "unbundled practice of law" section that explores many ways that lawyers are now providing services that are non-traditional. For example, in 2011 the Bar adopted ethics opinion 2011-3 allowing for "collaborative" representation of parties in



"The Alaska Bar Association already has an "unbundled practice of law" section that explores many ways that lawyers are now providing services that are non-traditional."

a divorce proceeding. In a "collaborative" divorce, the clients on both sides agree with their respective lawyers that they will attempt to resolve their differences by negotiation without litigation. If the parties are unable to do so, and litigation follows, the lawyers must withdraw, and the clients have to find new lawyers to represent them in the ensuing lawsuit. Alaska has now definitively said that such arrangements are ethical, even though they give the other side a veto over an attorney's ability to continue representing a client: all the other side has to do is refuse to settle, and the client has no choice but to fire his or her

lawyer.

Technology has also fundamentally changed the relationship traditional lawyers have with their clients. The District of Columbia Bar Association recently adopted an opinion that allows lawyers to participate in internet chat room communications with back-and-forth conversations that take place in real time. Such conversations raise a number of issues. Does the lawyer who is responding to a legal question have a lawyer/client relationship with the person asking the questions? Is the lawyer engaging in inappropriate direct solicitation of clients? Are lawyers violating laws regarding unauthorized practice by communicating legal advice to someone living outside their li-

censed jurisdictions?

Moving a little further out on the limb, there are now computer apps available to any non-lawyer that can be used to obtain legal advice. One app allows the user to seek preliminary legal advice from attorneys free of charge. The user can then decide whether to hire the lawyer who responds. Another allows immigrants to determine their eligibility for citizenship, and to learn what documents they need to apply and how to fill them out. There is an app that allows users to take a picture of a ticket or other document, upload it onto the web and make it accessible to any number of lawyers who can then look at it, provide advice, and, if they choose to do so, enter a fee bid to represent the client. There are apps that automatically record what happens during a traffic stop or other routine contact with law

Continued on page 3

## EDITORS' COLUMN

### Editor returns to her first landfall in Alaska

By Meghan Kelly

I am writing this column from Kodiak, the island that was my first Alaska home. During the fall semester of my third year of law school I sat on the floor in my sweltering Denver house stuffing envelopes with resumes and cover letters, nervous excitement colored with fear of starting down a path into the great unknown of legal career in a far-away place made the task feel surreal. I posted the applications to places with strange names I had only seen on a map, and only when I made a point to look for them. Kotzebue, Kenai, Nome, Barrow, Kodiak.

My daydream of living on the last frontier was interrupted when people began to call me – I don't think I believed it would really happen. I found myself talking with judges in remote bush communities and in the big cities, and I realized, probably for the first time, that the adventure of life and practice in a place of which I had heard my parents tell almost unbelievable stories from their travels in the 1970s, could be a reality. These judges were lawyers who had come from farm communities in the Midwest, bustling eastern cities and sunny Californian beach-

es, from across the country to Alaska, and had made meaningful lives and successful careers for themselves in that wild place.

I recall the day that Judge (now Justice) Bolger called to talk with me about Kodiak. He told me how he had come to Alaska as a new attorney and worked with people who could not afford to hire a lawyer. We talked about bison and bears, surfing and missiles, and a place where you could drive "to the end of the road" — a concept that someone born and raised in the middle of the country could not quite fathom. The judge's intellect, integrity and sense of adventure transmitted loudly across the thousands of miles separating us. By the end of our brief phone call I knew that this was someone I wanted to teach me about being a lawyer.

I have come back to my Alaska beginning. I will miss many things from my life in Anchorage — my friends, colleagues, the amenities of the city and the road system. But Kodiak has been special to me since the day I arrived on the ferry those



"I am excited to begin this new chapter of my life and career in this unique place."

seven years ago. The pace is a little slower here. I find myself pulling over to look out at the ocean almost every day on my trip home from the office. Today I am distracted by the activity around the harbor that I can see from my window — salmon season has begun and the boats are springing back into action. I am excited to begin this new chapter of my life and career in this unique

place.

In this issue we offer some memories and a fond farewell to one of forefathers, territorial lawyer Dan Cuddy. You will "meet" our new president of the Alaska Bar Association, Nelson Page, and see photos from the successful Bar Convention that took place last month in Fairbanks. We have also included updates from several of our local bar associations, and I hope that we can continue to offer similar bits of news to keep you informed about your colleagues' practices and lives from all corners of this great state.

Wishing you a summer of sun,  
Meghan

## The Alaska BAR RAG

The Alaska Bar Rag is published quarterly by the Alaska Bar Association, 840 K St., Suite 100, Anchorage, Alaska 99501 (272-7469).

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### Board of Governors meeting dates

September 10 & 11, 2015  
October 29 & 30, 2015  
(July Bar Exam results & budget)  
January 28 & 29, 2016  
May 9 & 10, 2016 (Anchorage)  
May 11 - 13, 2016  
(Annual Convention in Anchorage)

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## Technology, 'legal techs'

*Continued from page 2*

enforcement. Others provide templates for contracts and other legal documents, help non-lawyers draft valid and binding wills and trusts and advise about choosing an appropriate business entity. Eventually it may become true that lawyers can be replaced by computers, at least for some services.

All of these changes are being driven by two things: the first is the revolution in technology. Information and resources are now available to anyone with a smart phone. It was inevitable that technology

would create new ways to provide information about the law and legal processes. It was inevitable that these new resources would be used to compete with our historic monopoly on access to the legal world.

The second driver of change is the failure of the legal profession to stay ahead of the demand for legal services. Much valuable effort is spent by our profession on providing legal representation to those who can't afford to pay for a lawyer. Our commitment to pro bono representation is real and substantial, and has made a huge difference in the lives of many. But we should face facts: Most ordinary people still can't afford our services. There are thousands of Alaskans who need help on everything from divorce and child custody issues to partnership and business advice. Many of them could not dream of paying what it would cost to have a lawyer advise them. Alaska Legal Services and other similar legal aid programs are overwhelmed with clients and lack the resources to represent all those who need their help. Faced with the pressure of unmet need, and coupled with a growing list of options and possibilities, it should not be a surprise that the next few years will see major changes in how law is practiced and how legal services are delivered, and by whom.

Nor can we lawyers continue to rely on monopolistic protections of our profession. In the near future it may no longer be enough to argue that only a licensed professional who has completed three years of graduate school can provide advice on the law. Even the United States Supreme Court may be starting to waiver. In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, No 13-543, slip. op at 14 (2015) the court held that the licensing board for dentists in North Carolina could not claim state agency immunity when it sought to limit teeth-whitening services to licensed dentists. The court found that the board's attempts to enforce its rules regarding teeth whitening was not protected by the "state action" exception to antitrust laws. One could argue that the court's reasoning is applicable to state bar associations that seek to enforce limitations on those who can practice law:

"When a State empowers a group of active market participants to decide who can participate in its

market, and on what terms, the need for supervision is manifest. [citation omitted] The Court holds today that a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy Midcal's active supervision requirement in order to invoke state-action immunity." *Op. No 13-534, Slip op. at 14. (Feb. 25, 2015)*

At a minimum this language suggests that any attempts by the legal profession to enforce restrictions on unauthorized practice of law must be based on clear facts and

compelling reasons.

What does this mean for lawyers? In the words of Abraham Lincoln, "we must disenthral ourselves" about our profession. If we can't prevent major changes – and it as at least possible that we cannot – we should use our (currently)

**It was inevitable that technology would create new ways to provide information about the law and legal processes. It was inevitable that these new resources would be used to compete with our historic monopoly on access to the legal world.**

unique position to make sure that the changes happen in a way that preserves the important things. There will always be a need for fair and impartial redress in a justice system that is accepted as the final arbiter of disputes. There will always need to be a way to ensure that legal advice and legal services are competent and meet minimum standards. And, until that ultimate computer is invented, there will always be a need for highly trained and skilled professionals who can provide the full range of legal advice and services any client may require. Who is to supervise and enforce the rules regarding how law is to be practiced, and whether standards – whatever they may be – have been met? If it is the bar, where will the resources be found to do the work? If the regulatory functions apply to non-lawyers, will non-lawyers also be part of the regulatory body that does the enforcement? What ethical rules will apply and to whom? How will the public be protected? What areas should not be open to non-lawyers to practice in? These are all issues I think we need to ponder as the future arrives whether we want it to or not.

*Nelson Page is the newly elected president of the Alaska Bar Association.*

### Your new president

**Name:** Nelson Page  
**Position:** President  
**Board member since:** 2012  
**City:** Anchorage  
**Alaska resident since:** 1978  
**Firm or Agency:** Burr Pease & Kurtz

**Law School:** Georgetown University Law Center

- I live with a trilingual dog. She understands commands in English, German and Russian. She has not yet succeeded in teaching me any Russian.
- My current secretary, Wilma French, was my first secretary when I came to work at Burr, Pease and Kurtz in 1979.
- My first job when I came to Alaska was for Warren Matthews.
- I once completed the Mayor's Marathon. No records of any kind were set and, as the scientists would say, the result is not reproducible.
- My significant other is a mental health therapist who works with juveniles. She says that the training comes in handy.

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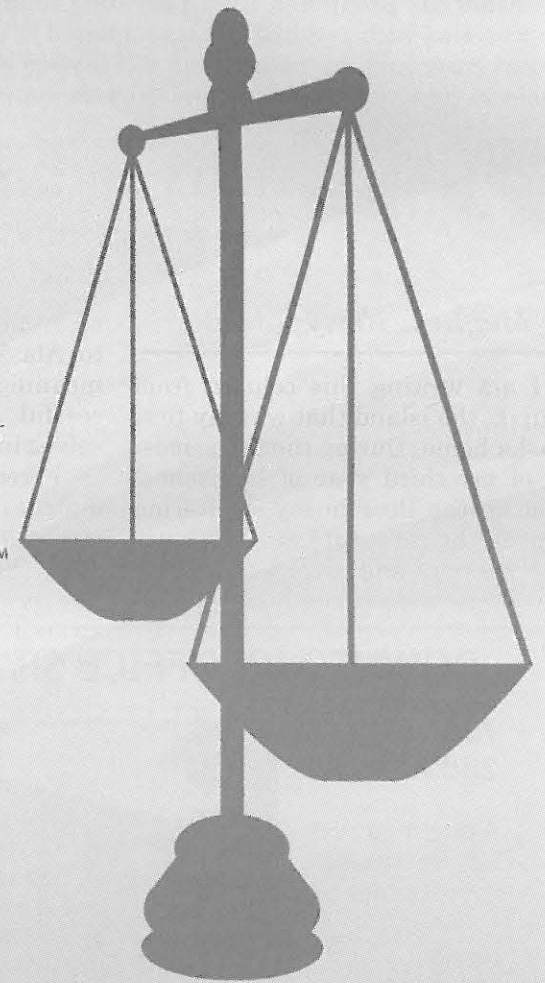


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Report of the Task Force  
on the  
**Review of the Role and Governance Structure**  
**of the State Bar of Arizona**

September 1, 2015



ADVANCING JUSTICE TOGETHER | 2014-2019

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**Members:**

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## **Part I: Executive Summary**

Arizona Supreme Court Administrative Order No. 2014-79 (see Appendix A) established the Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona (the “Mission and Governance Task Force,” or “Task Force”). The Order directed the Task Force to review the Rules of the Supreme Court on the mission and governance structure of the State Bar of Arizona (“SBA”) and to make recommendations concerning the SBA’s mission and governance.

The members of this Task Force have distinguished credentials and a wealth of governance experience. Its members include five former presidents of the SBA. Other Task Force members have served on the SBA’s governing board, some in leadership positions. Task Force members also include a former Arizona Secretary of State and a former Arizona Attorney General, former Arizona gubernatorial chiefs of staff, a past-president of Arizona State University, and leaders of public and private organizations.

The Supreme Court oversees the SBA. Times change, and the entry of A.O. 2014-79 recognizes that what might have been appropriate for the bar’s mission and governance decades ago may not be optimal today. This review was not occasioned by perceived problems with the current system, but rather in an attempt to follow best practices. After considerable study and discussion of the SBA’s mission and current governance structure and rules, the Task Force makes recommendations that sharpen the focus of the bar’s mission and provide for more efficient bar governance. These recommendations also take into consideration the 2015 opinion of the United States Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*, which concerns oversight of a profession by a governmental entity.

Most of the recommendations in this report require amendments to Supreme Court Rule 32, which provides for the “Organization of the State Bar of Arizona.” Task Force recommendations that also require amendments to certain SBA by-laws are not included with this report.

The recommendations summarized below, and further explained in the following pages of this report, acknowledge that the SBA’s past and current governors, officers, volunteers, and staff perform worthwhile work with integrity and dedication. Task Force members are grateful for all that these people have done and for the work that they continue to do.

The recommendations in this report represent the views of a majority of Task Force members. A member has submitted a dissenting view, which is included in Appendix J.



## Summary of Task Force Recommendations

1. **Rule 32:** *The Task Force recommends amending Supreme Court Rule 32 to clarify that the primary mission of the State Bar of Arizona is to protect and serve the public and, secondarily, to serve its members. The Task Force also recommends restyling and reorganizing sections of Rule 32 for clarity and readability. Appendix F shows the provisions of Supreme Court Rule 32 as proposed by this report.*
2. **Integrated bar:** *The Task Force recommends that the State Bar of Arizona continue to be integrated and supervised by the Arizona Supreme Court and that membership in the integrated bar be a requirement for practicing law in this state.*
3. **Composition of the board:** *The Task Force supports the current system under which some members of the governing board are elected by attorneys and other board members are appointed.*

*However, the Task Force recommends reducing the board's size (currently 30 members) to either 15 or 18 members. To accomplish this reduction, the Task Force recommends eliminating ex-officio board members, discontinuing a board seat dedicated to the president of the Young Lawyers Section, and establishing fewer electoral districts.*

*A smaller board can be composed in various ways by using different proportions of elected and appointed members. The Task Force presents three options for composing the governing board. One of the suggested options features a board on which the majority of members would be elected by attorneys. The other two options propose a board on which a majority of members would be appointed by the Arizona Supreme Court.*

*To preserve continuity of the board's leadership and its institutional knowledge, the Task Force recommends that board members serve staggered terms. Implementation of the governance recommendations in this report would achieve equal and predictable election and appointment cycles. These recommendations include implementation tables, shown in Appendix G, for each of the three suggested governance options.*

4. **Qualifications, term limits, and removal of board members:** *The Task Force recommends adding a requirement that attorneys who serve on the board, whether as elected or appointed members, have a clean disciplinary record during a five-year period preceding their board service.*

*Elected board members should have a term limit. Board members should serve no more than three consecutive three-year terms, and should then sit-out a full term before seeking reelection to additional terms. The Task Force recommends that Rule 32 also include a process for removing a board member for good cause.*

5. **Officers:** *The leadership track of the board should consist of three officers -- a president, a president-elect, and a secretary-treasurer -- rather than the current five officers. Appointed as well as elected board members should be eligible to hold office.*
6. **Fiduciary duties:** *To emphasize the fiduciary role of the board, the Task Force recommends changing the name of the SBA's "Board of Governors" to the "Board of Trustees." As a condition of serving on the board, board members should participate in an orientation that specifically addresses their fiduciary duties.*
7. **Board of Legal Specialization:** *In response to North Carolina State Board of Dental Examiners v. FTC, the Task Force proposes rule amendments that would provide Supreme Court supervision over the State Bar's Board of Legal Specialization.*

## Part II: The State Bar of Arizona

**A voluntary bar.** The Arizona Bar Association was Arizona's first organized bar. It was formed in 1895, just 24 years after establishment of the territorial Supreme Court. Membership in the Arizona Bar Association was voluntary.

**An integrated bar.** The State Bar Act, passed in 1933, established the State Bar of Arizona. Under the Act, those engaged in the practice of law in Arizona were required to be SBA members. At that time, Arizona had approximately 650 attorneys and two dozen judges, only a third of whom had been members of the previous voluntary bar organization.

**Supreme Court rules.** The Supreme Court adopted court rules governing the SBA and the practice of law in 1973. Those rules maintained the SBA as an integrated bar and mandated that attorneys be members as a requirement of practicing law in Arizona. The Supreme Court and the Legislature exercised joint oversight over the practice of law until the "sunset" of the State Bar Act in 1983. Thereafter, and continuing to the present, the Arizona Supreme Court has exclusively regulated the practice of law in Arizona.<sup>1</sup> Supreme Court Rule 31(a)(1) specifically provides:

Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.

**The current State Bar.** The State Bar of Arizona now has more than 17,500 active members and an additional 5,000 members who are judges, retired or inactive members, or in-house counsel.

The SBA currently has about 100 employees, more than \$12 million in assets, and an annual budget exceeding \$14 million. Approximately one-half of the SBA's budget is devoted to attorney regulation. In 2013, the discipline system fielded almost 3,500 inquiries and handled more than 700 formal attorney misconduct investigations,

<sup>1</sup> "This court has long recognized that under article III of the Constitution 'the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court.' *In re Smith*, 189 Ariz. 144, 146, 939 P.2d 422, 424 (1997) (quoting *Hunt v. Maricopa County Employees Merit Sys. Commission*, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980) (citations omitted)). The court's authority over the practice of law is also based on the creation of an integrated judicial department and the revisory jurisdiction of this court as provided in article VI, sections 1 and 5(4) of the Arizona Constitution." *In re Creasy* 198 Ariz. 539, 12 P.3d 214 (2000).

resulting in 136 sanctions and 300 cases of diversion and member assistance. The SBA that year also addressed nearly 100 complaints against non-lawyers concerning the unauthorized practice of law.

The SBA offers widely used member services, such as the following, that are designed to ensure professionalism and competence on the part of its attorney members and assist with the Bar's primary responsibility of protecting the public: (1) The "ethics hotline" fields about 2,500 calls annually (or about 10 calls each business day). (2) A continuing legal education department presents nearly 200 seminars every year, about one-fourth of which concern ethics. (3) Nearly 2,000 SBA members attend the bar's annual convention, which features dozens of education sessions. (4) SBA sections regarding particular areas of the law serve more than 2,000 members and conduct about 160 programs annually. (5) More than two dozen SBA committees deal with specific substantive matters of law, such as court rules and jury instructions, or with broader issues like the mentoring of new attorneys and law office technology. (6) A law office assistance program helps lawyers improve law office management skills, and a trust account hotline responds to hundreds of inquiries each year regarding trust account management. (7) SBA publications include a directory, which helps the public and other lawyers locate licensed Arizona attorneys. (8) A monthly magazine, the *Arizona Attorney*, educates attorneys about recent court rulings, discipline actions, and key topics affecting the practice of law.

The SBA conducts other activities that also directly benefit the public. Every year, the SBA receives approximately 100 claims for reimbursement from the Client Protection Fund, which holds funds in trust from an annual assessment on SBA members. Those funds go to pay about \$300,000 annually to claimants whose attorneys caused them financial harm. Moreover, the SBA's conservatorship program assures that clients receive their files when their attorneys die, disappear, or become disabled without having a succession plan in place. The SBA also offers, without charge, a voluntary arbitration program to expeditiously resolve fee disputes between clients and their counsel. In addition, the SBA sponsors Law Day legal clinics, provides legal services to veterans and active duty service men and women, organizes programs benefitting the homeless, and provides a "diversity pipeline" that introduces high school and elementary students to law careers.

In summary, the programs described above protect the public by educating attorneys and by making them more capable, competent, and professional. These programs also serve the public interest by providing remedies for individuals who have been harmed by their counsel and by increasing the public's access to legal services and our justice system.

### Part III: Mission of the State Bar of Arizona

A. **Rule 32(a).** Supreme Court Rule 32(a)(1) establishes the organization known as the State Bar of Arizona. This rule also details the mission of the SBA in a cumbersome, 266-word sentence.

In addition to being difficult to read, the Task Force believes the current Rule 32(a) fails to identify and express the SBA's core mission. Task Force members unanimously believe that the SBA's primary mission is to protect and serve the public. Activities undertaken by the SBA require the board to ask the predicate question, "Does this activity in some way protect or serve the public?" The SBA's functions derive from affirmative answers to that question. The SBA has responsibilities to improve the legal profession, to promote attorney competency, to enhance the administration of justice, and to assure that everyone, regardless of income, has access to the legal system, all of which derive from the bar's fundamental mission of protecting and serving the public.

Current Rule 32(a)(1) would make considerably more sense if the rule began with a statement that the SBA's core mission is protecting and serving the public. The other substantive elements of the rule become more focused and meaningful when preceded by a straightforward acknowledgement of that purpose. The Task Force therefore recommends amending Rule 32(a) to clearly express the SBA's core mission.<sup>2</sup> The Task Force also recommends restyling and reorganizing Rule 32(a) to make it easier to read and understand.<sup>3</sup>

B. **An integrated bar.** Attorneys understand that an "integrated" state bar (also referred to as a "unified" or a "mandatory" bar) is one a person must join in order to practice law in that state. Less understood are the reasons for having an integrated bar. Simply put, the bar is integrated with, and an integral part of, the Supreme Court. The functions of an integrated bar relate to, and assist in, the administration of the

<sup>2</sup> The SBA has adopted a concise mission statement that includes in its first eight words an emphasis on this core mission:

**The State Bar of Arizona serves the public** and enhances the legal profession by promoting the competency, ethics, and professionalism of its members and enhancing the administration of and access to justice.

<sup>3</sup> The proposed restyling of Rule 32(a) makes changes to paragraph 1 of the current rule, entitled "establishment of state bar," but omits in its entirety paragraph 2 of this rule, which is entitled "precedence of rules." The Task Force believes that paragraph 2 should either be deleted from the rule as unnecessary or moved to the rules concerning admission to the bar.

judicial branch of government. See *Bridegroom vs. State Bar*, 27 Ariz. App. 47, 550 P.2d 1089 (1976).

An integrated bar benefits not only the Court and the bar, but the public as well. The Court has adopted ethical rules for the protection of the public, and the bar's regulatory function assists the Court in enforcing those rules. But what is equally important is that the bar works proactively to assure that its attorney members comply with the rules. The bar educates its members on professionalism and ethics and provides an ethics hotline so that attorneys may receive advice on specific ethics questions. It assists attorneys with trust account regulations and law office management. It promotes the competence of its members by establishing sections in specific areas of practice and by educating members in substantive matters of law. The bar is not required to provide these services to fulfill its regulatory function, yet these services promote attorney competence, and they therefore play an important role in consumer protection and serving the public interest.

A review of current Supreme Court Rule 32(a) confirms the bar's functions and duties. The rule directs the SBA to "advance the administration of justice," to "aid the courts in carrying on the administration of justice," to foster "high ideals of integrity, learning, and competence" and to encourage "practices that will advance and improve the honor and dignity of the legal profession." The SBA's convention, committees, and sections, as well as other programs, further these objectives. While the members of the legal profession benefit from these programs, those activities also serve the broader needs of society.

The above-mentioned concepts in Rule 32(a) have a direct link with the Arizona Rules of Professional Conduct, the Supreme Court's ethics rules that every attorney must follow. The preamble to those rules recognizes that "a lawyer... [is] a public citizen having special responsibility for the quality of justice." The preamble continues,

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession . . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

The SBA's responsibilities set forth in Rule 32 go hand-in-hand with lawyers' duties under the ethical rules. The bar is the organization that effectuates those duties for its members. An integrated bar has intrinsic value. It includes a vision that lawyers

do not practice in isolation. Rather, every individual attorney has a relationship with the bar and the judicial system and is a partner in fulfilling the worthy objectives described above.

The integrated bar provides an essential connection between its members, the courts, and the community. A voluntary bar operates independently of the Supreme Court, and without court supervision. It lacks a critical connection with the court. By contrast, an integrated bar is interdependent with the court; they function as the hand and the glove. For example, the SBA was instrumental in proposing recent changes to the attorney discipline system to make it more efficient and fair, which the Court adopted. An integrated bar brings technical expertise and real-world experience in the practice of law to the governance and regulation of attorneys. It is a catalyst for an effective system of justice, and a keystone in the rule of law.

Arizona has had an integrated bar since the SBA was established in 1933, but recent legislative efforts have attempted to change this arrangement. In 2013, a bill was introduced to make membership in the State Bar of Arizona optional. That bill quickly died, but HB 2629, introduced in the First Regular Session of 2015, had a similar objective, and unlike the 2013 bill, HB 2629 advanced out of a House committee. HB 2629 eventually failed, but the full House vote that defeated the bill was a close one.

These recent bills perceive the SBA as a union or a labor organization with mandatory membership, and contrary to Arizona's constitutional declaration that Arizona is a right-to-work state.<sup>4</sup> These bills misconstrue the nature, purpose, and function of the SBA. Labor organizations exist primarily to bargain with employers for their members' benefit, for such things as compensation, working conditions, vacations, hours, leave time, overtime, and pensions. But the SBA does not bargain with law firms or the public for any of these employment-related benefits. Rather, the SBA serves the

<sup>4</sup> See the Arizona Constitution, Article 25. Nonetheless, the United States Supreme Court has upheld the validity of integrated state bar associations. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990) ("We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, but disagree as to the scope of permissible dues-financed activities in which the State Bar may engage."). With a few specified exceptions, dues-financed political or ideological activities are expressly prohibited by Article XIII of the SBA's by-laws. The SBA's by-laws also provide a process for challenging speech or activities perceived to be impermissible. The process involves arbitration and, if a challenge is upheld, it requires a refund of improperly spent bar dues. By comparison, a voluntary bar, one in which membership is not required to practice law, is free to engage in political and ideological activities.

public by upholding and enforcing attorneys' responsibilities to the public and advancing our system of justice. It is sui generis, a unique thing, and comparisons with other professional boards or vocational unions attempt to liken apples to carrots.

The most common complaint from attorneys about a mandatory bar is that they pay for services that may not benefit them individually or that they may not use.<sup>5</sup> It is true that an Arizona attorney does not need to utilize any non-regulatory bar services; those services are optional. That is, attorneys can forego reading the monthly magazine or decline to attend SBA continuing legal education programs or the annual bar convention (although the foregoing services are self-supporting and do not require the expenditure of dues). But other services – such as the client protection fund, the member assistance and law office management programs, and the conservatorship program – require the financial support of every attorney to be effective. The duty to protect the public is not owed just by the attorneys who become disabled, who mismanage a law office, or who cheat a client. All attorneys bear a responsibility to protect the public. An integrated bar assures that every attorney – not just half or even ninety percent of attorneys, but every attorney – shares the cost of that responsibility. These invaluable services will cease to exist with the demise of the integrated bar because no voluntary bar in Arizona offers them.

Most states have integrated bars. A minority of states use other models, which Task Force members have discussed. Arizona has had an integrated bar for more than eighty years. Although like any institution the SBA can be improved, the Task Force believes the integrated model well serves the courts, attorneys, and people of Arizona. The Task Force therefore recommends that the SBA continue to be an integrated bar association.

<sup>5</sup> States that have voluntary bar associations by and large do not have lower overall bar dues. They charge both a mandatory regulatory assessment and separate voluntary bar dues, which together often exceed the annual membership fee in the State Bar of Arizona. An integrated bar benefits from economies of scale (for example, in human resources, technology, office expenses, and rent) that might require duplication if there were separate regulatory and voluntary entities.



#### **Part IV: Governance of the State Bar of Arizona**

**A. General description of the current board.** The SBA is a non-profit corporation governed by a volunteer board. SBA governance provisions are found in the SBA by-laws and in Supreme Court Rules 32(d) [“powers of board”], 32(e) [“composition of board”], 32(f) [“officers of the State Bar”], and 32(g) [“annual meeting”].

In summary, a 30 member Board of Governors currently governs the SBA. The board is composed of 26 voting members, specifically, nineteen elected attorney members, four public members appointed by the SBA board, and three at-large members appointed by the Arizona Supreme Court. In addition, the board includes several non-voting ex officio members, including the deans of Arizona’s three law schools.

The Task Force’s discussions regarding current bar governance included the following topics: (1) whether the board is the proper size or too large to be effective; (2) whether board members are elected from disproportionately-sized districts; (3) whether elections result in disproportional representation; (4) the irregularity of election cycles; (5) whether public members are underrepresented on the board; and (6) whether it is appropriate for public members to be appointed by the board on which they will serve.

**B. Election of board members currently.** Active Arizona attorneys elect board members from eight geographic districts that are aligned by counties. The geographic districts, and the number of board members elected from each district, are as follows:

| District # | District area                    | # of board members |
|------------|----------------------------------|--------------------|
| 1          | Mohave, Navajo, Coconino, Apache | 1                  |
| 2          | Yavapai                          | 1                  |
| 3          | Gila, Graham, Greenlee           | 1                  |
| 4          | Cochise                          | 1                  |
| 5          | Pima, Santa Cruz                 | 3                  |
| 6          | Maricopa                         | 9                  |
| 7          | La Paz, Yuma                     | 1                  |
| 8          | Pinal                            | 1                  |

Elected board members serve three-year terms. The current rules provide for elections in two years of a three-year cycle. In one year of the cycle, board members are elected from Districts 1, 3, 4, 5, and 7 (a total of seven members); in a second year, members are elected from Districts 2, 6, and 8 (a total of eleven members.) No board elections occur in the third year of the cycle unless a special election is needed to fill a vacant seat.

In addition, the president of the Young Lawyers Section (“YLS”) serves on the board as a nineteenth voting member. A new YLS president is elected every year, and accordingly, the YLS president serves a one-year term on the SBA board.

**C. Appointment of board members currently.** “Public” and “at-large” members are appointed to the board.

*Public members:* Supreme Court Rule 32(e)(2) authorizes the SBA board to appoint four “public” members. These members may not be members of the bar or have any financial interest in the practice of law. Each public member serves a three-year term and may be reappointed for one additional term.

*At-large members:* Supreme Court Rule 32(e)(2) authorizes the Court to appoint three “at large” members. At-large members are appointed to serve three-year terms, and have no term limit. At-large members need not be attorneys. The Court’s at-large appointees traditionally provide expertise or help ensure diversity on the board.

With regard to appointed board members:

- A minority of Task Force members expressed the view that no attorneys – by either appointment or election -- should serve on the board (i.e., that the regulated should not serve as regulators.) Those who hold this view would require that the board be composed entirely of appointed public members. However, the majority of Task Force members disagree with this view. The majority believes that view places undue focus on the board’s regulatory function and ignores the board’s numerous non-regulatory activities that benefit the public.

The Task Force notes that virtually all of Arizona’s other professional boards include members from their respective occupations. Among these professional boards are the State Boards of Accountancy, Appraisal, Behavioral Health Examiners, Chiropractic Examiners, Dental Examiners, Homeopathic and Integrated Medical Examiners, the Arizona Medical Board, and the State Boards of Naturopathic Physicians, Nursing, Dispensing Opticians, Optometry, Osteopaths, Pharmacy, Physicians Assistants, Podiatry, Psychologists, Technical Registration, and Veterinarians.

The majority of the Task Force believes that attorneys are necessary members of the board of the State Bar of Arizona because, like members of other professional boards, they understand the needs of the profession and they have the requisite technical expertise.

- Task Force members nonetheless agree that the Bar’s goal of protecting the public requires the SBA’s board to include a significant proportion of public non-lawyer members. There is also consensus that public board members should have diverse backgrounds and particular skills that will be of benefit to the board.

***D. North Carolina State Board of Dental Examiners v. FTC.*** On February 25, 2015, during the term of this Task Force, the United States Supreme Court decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. \_\_\_\_\_. In that case, the North Carolina Dental Board, which was composed almost entirely of dentists, sent cease-and-desist letters to people not licensed as dentists who were performing teeth whitening services at lower cost than services provided by dentists. The Court held that a state regulatory board composed of regulated members who are active market participants, and which lacks adequate state supervision, was not immune from anti-trust claims for denying others an opportunity to participate in the marketplace. The Court said, “If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity ... is to be invoked.” Bar associations and other regulatory agencies nationwide are concerned about the implications of the decision. The SBA immediately established a task force to determine the effect of this opinion on its operations and programs.

The Supreme Court’s Task Force considered whether the *North Carolina State Board of Dental Examiners* opinion required that the State Bar’s governing board be composed primarily of non-attorneys. Most members of the Task Force believe, however, that the proposed SBA board configurations and other recommendations of this Task Force comply with the *North Carolina State Board of Dental Examiners* opinion. In terms of supervision, the State Bar board has a duty to abide by Supreme Court rules, and the Supreme Court oversees the governing board under its rule-making authority. An associate justice customarily serves as a Supreme Court liaison at board meetings, and the Director of the Administrative Office of the Courts has served as an at-large board member for the past several years. In addition, the SBA board president serves as a permanent member of the Arizona Judicial Council, and a number of state court judges, who are supervised by the Supreme Court, serve on SBA committees. The SBA keeps the Supreme Court up-to-date on current issues, and it often seeks Court input, formally as well as informally, on matters of concern. There is therefore meaningful interaction between the Court and the bar, with ongoing Court supervision of the bar and its governing board.

In addition, the regulatory functions relating to attorney admissions and discipline are already subject to Supreme Court oversight. The board makes recommendations to the Court for appointments on two Supreme Court committees that concern admissions: the Committee on Examinations and the Committee on Character and Fitness. The board

also oversees the collection of bar dues, and it approves a budget for the bar's professional staff, which screens and prosecutes disciplinary matters. However, attorney admissions and discipline are primarily functions of the Supreme Court, and only to a lesser degree of the SBA's professional staff, which reports to the SBA's executive director rather than to the board.

The *North Carolina State Board of Dental Examiners* opinion concluded as follows:

[T]he inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide 'realistic assurance' that a non-sovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

574 U.S. at \_\_\_; slip op. at 17-18.

The Court's rule-making authority, including its power over rules concerning State Bar governance, provides additional and "realistic assurance" that the bar will not engage in anti-competitive conduct. And a majority of Task Force members believe that the Arizona Supreme Court currently provides an appropriate level of active supervision of the bar. But to further improve supervision, the recommendations in this report include:

- The appointment of "public" board members by the Arizona Supreme Court, rather than by the SBA's board (see Part IV, Section G)
- An increase in the proportion of members who serve on the board by virtue of Supreme Court appointment, rather than by election (see Part IV, Section G)
- A process for Supreme Court review of a finding of good cause for removal of a board member (see Part IV, Section L)
- Adoption of a new Supreme Court rule concerning the Board of Legal Specialization (see Part V)

**E. Advantages and disadvantages of the board's current size.** The Task Force considered professional literature regarding best practices for the governance of non-profit organizations, including a 2012 *Hastings Law Journal* article by Daniel Suhr entitled "Right-Sizing Bar Association Governance." (See Appendix B.) Mr. Suhr reported a finding by the ABA's Division of Bar Services that the average unified state bar board had 34 members. Mr. Suhr recommended smaller governing boards:

The move to small boards is based on empirical research comparing the different organizational and interpersonal dynamics on large boards versus small boards. Large boards tend to run on parliamentary procedure ...

where speakers are called on and identified, rather than the conversational style possible on a small board. This conversational style allows for consensus to emerge more organically, after a full and vigorous discussion, whereas decisions on big boards are almost always made by a formal vote after a stilted and often shortened discussion. Moreover, large boards allow for free-rider members who may attend a few meetings but who do not contribute to the actual governance of the organization: in the memorable phrase of William O. Douglas, “directors who do not direct.” (Suhr article, Appendix B, at pages 5-6)

With particular regard to bar associations, Mr. Suhr added:

When it comes to the size and composition of the board, the easy path is always to go bigger, to ensure that every type of firm and area of practice, every geographic region and stage of career, every section and division and county, is represented. But representation of diverse constituencies is out of step with current best practices. A focus on diversity stems from a belief that the main purpose of the board is to provide a forum for diverse perspectives and to pass resolutions through a representative assembly. But a more accurate understanding of the board’s role recognizes that its primary responsibility is to govern – often to govern a large organization with tens or hundreds of thousands of members, millions of dollars, and scores of staff. The counsel of the governance literature, which lawyers have helped produce, is clear: resist the temptation to go bigger, and instead move towards a smaller “working” board. (Suhr article, Appendix B, at page 7)

Other literature affirms this message. The Task Force had extensive discussions about the size and composition of the SBA board. It concluded that the size of the SBA’s current board has both advantages and disadvantages.

*Advantages:*

- A large board enhances the likelihood that more geographic areas of the state are represented, and representation may enhance “buy-in” from the membership.
- A large board may enhance ethnic, gender, area-of-practice, size-of-firm, and other types of diversity on the board.
- A bigger board provides a larger pool from which to groom and select qualified members as officers.

*Disadvantages:*

- The board's size of 30 members makes it unwieldy. Meetings run long and are less efficient, the agenda may include items that do not appropriately relate to the board's high-level function, and individual members may participate less on a larger board than they would on a smaller one.
- Elections in the second year of the SBA's election cycle can result in eleven new members joining the board at one time, including as many as nine new members from Maricopa County. This can disrupt the board's continuity, and inhibit a smooth transfer of institutional knowledge.
- The current election districts do not provide proportional representation and in fact contribute to disproportionate representation. Maricopa and Pima Counties have 91 percent of the active lawyers in Arizona, yet the thirteen remaining counties, with 9 percent of the state's attorneys, have one-third of the elected seats on the board. (See Appendix D.) There are more than 11,000 active lawyers in District 6 (Maricopa County), and there is currently, per capita, one board member for every **1200** Maricopa lawyers in this district. On the other hand, District 3 (comprising Gila, Graham, and Greenlee Counties) has one board member for about **72** attorneys. District 4, Cochise County, has one board member for about **102** attorneys. (See the current "per governor" tables at the second page of Appendix D.)
- Elections by district have reportedly led to constituencies, where elected members see themselves as "representatives" who vote based on the direction of members in their district who elected them or special interest groups, rather than voting in the best interests of the public and the entire profession.

**F. Workgroup suggestions.** At one point during its review of bar governance, the Chair divided the Task Force into three workgroups and asked each group to recommend its preferred board configuration. There are, of course, many possible board configurations, and the three workgroups put forth significantly different proposals. However, each workgroup suggested that:

- The optimal size of the board would be from fifteen to eighteen elected and appointed members;
- The board should be composed to represent the public's interest first, and secondarily the interests of the attorney members;

- A greater proportion of appointed board members (although not necessarily a majority of the board) could mitigate perceptions that elected board members are answerable to constituencies; and
- The Court's appointment of "public" members, upon nomination by the board -- rather than the board's direct appointment of public members -- could further enhance the Court's supervision of the SBA.

**G. Recommended Task Force options for the board's composition.** After considerable discussion, the Task Force agreed to recommend three options for configuring the board: Option X, Option Y, and Option Z. Each option has these two features:

- Every "member," whether elected or appointed, would have voting rights. There would no longer be non-voting "ex officio" members on the board.
- Each of the three recommended options is based on a number divisible by 3. Divisibility by 3 facilitates staggered terms and regular election cycles over the course of three years, which harmonizes with members' 3-year terms.

**Option X:** The hallmark of Option X is a reduction in the size of the board to 15 elected and appointed members. Option X has the following configuration:

- 6 elected attorney members. One workgroup proposed "statewide" election of attorney members for all three options; however, a majority of bar members are in Maricopa County, and a statewide election could result in a board composed of only Maricopa County lawyers. The members' preferred alternative was elections by district. For Option X, this alternative features four districts. It proposes the election of three board members from Maricopa County, one from Pima County, one from the counties of Division One of the Court of Appeals (excluding Maricopa), and one from the Division Two counties (excluding Pima).
- 9 members appointed by the Arizona Supreme Court. Three of these nine appointed members would be "public" members -- that is, non-attorneys -- who would be nominated by the SBA's governing board. However, unlike the current rule regarding public members, the Court, rather than the board, would actually appoint the public members. The board's nomination of public members would facilitate the Court's appointment of non-attorneys with special expertise, such as finance, human resources, or business management, whose knowledge might be of particular value to the board. Notwithstanding the

board’s nomination of public members, a majority of Task Force members agreed that the Court may decline to appoint any board nominee and may appoint as a public trustee a person not nominated by the board.

The other six Court-appointed members could be attorneys or non-attorneys, comparable to “at-large” members under the current rule. If the Court’s appointments were made after the election of board members, the Court could fill any gaps in the board’s balance and diversity (including geographic diversity) that elections did not achieve.

**Option Y:** This option features a board with 18 elected and appointed members. An 18-member board, compared to one with 15 members, could enhance the board’s diversity through greater geographic, firm-type, socioeconomic, and other backgrounds that might enhance and balance the board.

Option Y would divide the 18 board members into three equal groups, as follows:

- 6 elected attorney members. Members of the State Bar would elect these members from four districts, as described in Option X.
- 12 members appointed by the Arizona Supreme Court. Six of these twelve members would be non-lawyers nominated by the SBA’s governing board. A greater number of public members might further promote the SBA’s mission to protect the public. The remaining six appointed members would be “at-large,” and could be attorneys or non-attorneys, as described in Option X.

**Option Z:** Option Z is based on a presumption that although the current board is too large, it has a generally appropriate balance of elected and appointed members. Option Z downsizes the board to 18 elected and appointed members, and it reconfigures the current eight election districts into five districts, but it nevertheless maintains the status quo more than the other two options. Option Z features:

- 11 attorney members elected from 5 districts:

|   |           |
|---|-----------|
| <b>Maricopa County District</b>   | 6 members |
| <b>West District</b> (Yavapai, Yuma, and<br>La Paz Counties)                                      | 1 member  |
| <b>North District</b> (Mohave, Coconino<br>Navajo, and Apache Counties)                           | 1 member  |
| <b>Pima County District</b>   | 2 members |
| <b>Southeast District</b> (Pinal, Gila,<br>Graham, Santa Cruz, Cochise,<br>and Greenlee Counties) | 1 member  |



- 7 members appointed by the Supreme Court:  
 Non-lawyers nominated by the SBA board      4 members (“public”)  
 Lawyers or non-lawyers                              3 members (“at-large”)

This configuration preserves proportions that currently exist because:

- Maricopa would be reduced from nine members to six, *a one-third reduction*.
- Pima would be reduced from three members to two, *a one-third reduction*.
- Division One counties (Apache, Coconino, Mohave, Navajo, La Paz, Yuma, and Yavapai) would be reduced from three members to two, *a one-third reduction*.
- Division Two counties (Cochise, Gila, Graham, Greenlee, Pinal, and Santa Cruz – the latter of which is currently in District 5 with Pima County) would be reduced from three members to one. Although this is *a two-thirds reduction*, it mathematically provides a more accurate alignment with the relative number of attorneys in this district. The “per board member” table for Option Z (see Appendix D) shows that even with only one board member in the Southeast District, this person would be elected by fewer attorneys than a board member elected from any other district.
- There would be no reduction from the current number (7) of appointed board members. But because of the reduction in the number of elected board members, the percentage and proportion of appointed board members in Option Z *would actually increase* from the current 27 percent (i.e., 7 of 26 voting members) to 39 percent (7 of 18 voting members.) The four board seats reserved for public members constitute about 15 per cent of the current board, but the four public members would be 22 percent of Option Z’s board.

The proposed Option Z configuration would nevertheless maintain the character of the board as one with a majority elected by attorneys. Elections might still produce constituencies, but with a smaller board, possibly to a lesser degree.<sup>6</sup>

<sup>6</sup> The notion that elected board members actually represent the views of a majority of attorneys in their districts is called into question by the small percentage of attorneys who actually vote in SBA elections. Recent SBA election turnouts show that in 2014, the turnout in Maricopa County was 35 per cent; in 2012 it was 27 percent; and in 2011 it was 21 per cent. Pima/Santa Cruz had a 36 percent turnout in 2010, but only a 13 percent turnout in 2013. Cochise County had a 55 percent turnout in 2010, but it fell to 21 percent in 2013. In a special 2015 election, attorneys in District 8 elected a board member with 30 votes out of a total of 42 votes cast.

The notion of constituencies has also spawned a perception that urban board members are insensitive to the needs of rural members. No evidence was produced to demonstrate the accuracy of the perception, but the perception nonetheless exists. Option Z appreciates the need for participation by rural members in bar governance and the desirability of the board having perspectives of attorneys who do not practice in large urban areas. Options X and Y would elect two rural members, but Option Z would accommodate three elected rural members. Those three rural members would constitute about one-sixth (17 percent) of Option Z's board – and about one-fourth (27 percent) of Option Z's elected board members – although the thirteen rural counties have only 9 percent of the total number of attorneys statewide. While this affords rural counties more seats than their statewide proportion of population or bar membership, it more closely preserves the proportionate number of board seats those counties currently have.<sup>7</sup>

Task Force members did not formally vote on which of these three options they preferred. However, the Court – with input from the SBA and the public – should consider which option best serves the residents of Arizona and the members of its legal community, and which best harmonizes with *North Carolina State Board of Dental Examiners v. FTC*.

**H. Voting by active, out-of-state members.** The election provisions of current Rule 32 allow active attorneys to vote in the district in which they have their principal place of business. Those provisions effectively disenfranchise about fourteen percent of the active SBA members who reside or work out-of-state and so do not have a place of business in any of the rule-defined districts. The Task Force agreed that Rule 32 should authorize these active, out-of-state members to vote in the SBA's governance elections.

The Task Force considered creation of a separate “statewide” Arizona district in which these out-of-state members could vote, and other possible remedies. Ultimately, it decided that members should be allowed to vote in the Arizona district in which they worked or resided before moving out-of-state. Out-of-state members who never worked or resided in Arizona should be permitted to vote in the most populous district, which currently, and for all three options, is the Maricopa County District.

**I. Ex officio board members, advisors and liaisons.** There are several individuals who are referred to as “ex officio” board members. Ex officio members serve on the board by virtue of holding an office or a position.

<sup>7</sup> Indeed, if proportionate representation was the primary goal of Option Z, Maricopa County attorneys would choose at least eight of the eleven elected board members rather than only six.

**Immediate past president.** The immediate past president has the status of an ex-officio member of the Board of Governors under Section 8.02 of the SBA's by-laws, rather than by authority of any Supreme Court rule. Members of the Task Force agreed that the immediate past president provides the board with valuable guidance, advice, and institutional knowledge as the board transitions to new leadership, and that the past president should continue to serve in that role. However, the position should be established by court rule rather than by-laws. Also, references to the immediate past president as a "board member" are inaccurate because he or she does not vote.

The Task Force therefore recommends an amendment to Rule 32 to specify that the immediate past president serves as a non-voting "advisor" to the board for one year.

**Young Lawyers Section.** The Young Lawyers Section ("YLS") president is characterized as an "elected" member of the board under current Rule 32. A "young lawyer" is one who has been admitted to the bar for five years or less or is 37 years of age or younger. YLS members who have been admitted for fewer than five years are ineligible to stand for election as a "regular" board member.

Although established by Rule 32, the YLS board member might more aptly be described as "ex officio." The YLS president's seat on the board does not have the characteristics of other elected members' seats because the person is elected by his or her constituents to a YLS section office, and service on the SBA board is but a side-result of that election. Unlike other board members, the YLS president serves a one-year rather than a three-year term on the board. And the YLS president has less practice experience than is required for regular board members. Although more than 4,200 members, or about one-fourth of the SBA's active members, qualify as young lawyers, other groups of attorneys, such as the Arizona Women Lawyers Association or Los Abogados Hispanic Bar Association, also have large memberships, yet they have no seats on the board.

The Task Force recommends that the president of this group no longer serve on the board. However, the YLS president, like officers or representatives of other specialty and local bar associations, should always be honored guests at SBA board meetings.

**Law school deans.** The deans of Arizona's three law schools are commonly referred to as "ex officio" members of the board. Their status is established by board policy. Although a few have provided valuable comments, neither Supreme Court rules nor the SBA by-laws authorize membership of the deans on the governing board.

The rationale for having the deans as ex officio members is that after they attend board meetings, they will discuss issues with one another, and convey to their faculties and students important information they acquired during board meetings. Yet as far as can be determined, the deans rarely exchange views with each other or share the board's discussions with law school faculties or students. Moreover, the students at their law

schools, and at least some of their faculty, are not SBA members. A few members of the Task Force favored maintaining at least one dean as a board member, but the majority voted otherwise.

The deans as well should always be honored guests at board meetings, but the Task Force recommends discontinuing the deans as members of the governing board.

*Associate justice.* The Supreme Court has regularly assigned an associate justice to serve as a liaison between the SBA's board and the Court. The Supreme Court regulates the bar and it has a deep interest in bar governance. And it can be useful for the board to have the first-hand input of a Supreme Court justice. The Task Force acknowledges the benefits of the associate justice in facilitating communication between the SBA and the Court. The associate justice is occasionally referred to as an "ex officio" member of the board, but the associate justice attends meetings as a matter of Supreme Court policy rather than pursuant to Court rule or SBA by-laws.

The Task Force recommends that an associate justice continue to serve as a non-voting "liaison" to the board rather than as a board member.

**J. Terms of elected board members.** Elected members have no limit on their length of service. Some elected board members have served for two decades. This dedication is admirable, but it deprives the board of fresh ideas and energy from new members, and it inhibits the development of the next generation of bar leadership. Most integrated bars in other states impose limits on the number of terms a board member can serve or on the total years of a board member's service.

The Task Force recommends that all elected board members have a limit of three terms of three years each, for a total of nine years of service. An elected board member may not be a candidate for a fourth term until three years have passed after the ninth year of service. The Task Force recommends that this limitation become effective on the implementation date; therefore, it would not count a member's board service prior to that date. It also would not count a member's service on the board if the member is appointed to complete a partial term.

If a board member who is otherwise term-limited is the "president-elect" or president, the Task Force recommends that this not preclude the person from continuing to serve on the board until completion of their term as president. Upon completing the term as president, a new board member will be elected or appointed for the remaining partial term.

**K. Qualifications of board members.** Supreme Court Rule 32(e)(3) currently requires elected members to "have been admitted by the Arizona Supreme Court for not less than five (5) years." The Task Force believes this is fair and appropriate, and

recommends maintaining this requirement. But the Rule does not mention a clean attorney discipline record as bearing on qualifications; it only requires that attorney board members be “active [SBA] members in good standing” when elected. The Task Force believes an absence of formal bar discipline should be a qualification for an attorney’s membership on the board.

The Task Force therefore recommends adding to Rule 32(e) a requirement that attorney members of the board have no formal disciplinary history during a five-year period preceding service on the board. It further recommends that an attorney board member who is the subject of a formal disciplinary complaint be recused from serving on the board pending disposition of the complaint.

**L. Removal of board members.** Supreme Court Rule 32(f) provides that “an *officer* may be removed from his office by the vote of two-thirds or more of the members of the board of governors cast in favor of his removal at a meeting called for such purpose.” Rule 32(f) does not specify the grounds for removal of an officer, but Section 8.04 of the by-laws provides that the board may remove an officer “whenever in its judgment and discretion, the best interests of the State Bar shall be served thereby.” There is no corresponding provision in Rule 32 that permits removal of a board member. The Task Force proposes amendments to Rule 32 that would allow removal of a board member for good cause by a two-thirds vote of the board.

“Good cause” requires the board to consider the nature and circumstances of a board member’s conduct, and whether that conduct undermines board meetings or compromises the integrity or reputation of the board. For example, good cause might include the commission of a felony or a crime involving moral turpitude, the imposition of a formal discipline sanction (including a sanction that results in suspension or disbarment), repeatedly ignoring the duties of a board member, or disorderly activity during board meetings. Expressing unpopular views does not constitute good cause. The proposed amendments would provide a removed board member the opportunity to seek review of the board’s finding of good cause by filing a petition for review with the Arizona Supreme Court.

**M. Officers of the board.** Supreme Court Rule 32(f)(1) currently provides for five board officers -- a president, a president-elect, two vice presidents, and a secretary/treasurer. Each serves a one-year term in office, and customarily these officers move up the “succession ladder” to the office of president. Moving up the ladder to the office of president requires not only a five-year commitment to the officer track, but also a commitment to serving on the board to gain experience before entering that track. In other words, and because of the lengthy succession ladder, an SBA president often has a decade or more of board service.

The Task Force believes that five officers are unnecessary and that the officer succession ladder is too long. The president, president-elect, and secretary/treasurer positions have well-defined duties under the SBA's by-laws. Although the two vice-presidents are both members of the Scope and Operations Committee (the equivalent of an "executive" committee), Section 8.02 of the by-laws vaguely provides that the first vice-president "perform such duties as are assigned to him or her by the President." Section 8.02 also provides that the second vice-president serves as a member of the Strategic Planning Committee and as an ex-officio member of the Continuing Legal Education Committee (neither committee is established by the by-laws) but otherwise the second vice-president also performs "all duties assigned to him or her by the President."

The Task Force recommends that the board elect three officers: a president, a president-elect, and a secretary/treasurer. These are the essential offices. Each office should be held for a one-year term. The officer succession track would be, in essence, two years: one year as president-elect, and another as president. The person would also serve a third year as "advisor" to the board. The rule would not provide for automatic succession of the secretary-treasurer to the position of president-elect. The proposed rule would permit election of an appointed trustee, including a non-attorney, to an officer position, although the Task Force expects this would be a rare circumstances.

Although no president has served more than a single term in the more than 80 years of the SBA's existence, a rule amendment should specify that a board member may not be elected to a second term for any office that the member has held during nine, or fewer, years of consecutive service on the board.

In addition, the Task Force recommends that the selection of the president-elect be thoughtful and deliberate. Self-nominations may not elicit the best candidates for president-elect. The Task Force recommends that a nominating committee chaired by the immediate past president, with the assistance of several other board members appointed by the president, lead a process to recruit and vet the best candidates months in advance of the annual meeting.

**N. Fiduciary responsibilities of the board.** Members of the board have fiduciary duties, and yet some members appear to vote solely based on promises made to constituents or what they perceive their constituents want. A board member's fiduciary obligations are not to those who elected or who appointed the member, but to the public, the profession, and the organization as a whole.

To emphasize the fiduciary character of the board, the Task Force recommends changing the name of the SBA's "Board of Governors" to the "Board of Trustees." The Task Force intends this recommendation to be more than a mere name change. It is a recommendation intended to create a different perception of the role of the board and its

members. The board “governs” the organization known as the State Bar of Arizona, but it does much more. The board also acts in ways that protect and serve the public and the rule of law. In taking action, board members should set aside personal interests and the interests of the members in their districts and practice areas and do what is right for the organization and best for the general public. The word “trustees” more accurately describes the nature of the fiduciary duties of board members than the term “governors.”<sup>8</sup>

The Task Force recommends that the board draft a new oath for all future board members that includes a pledge to abide by their fiduciary responsibilities. It also recommends that fiduciary duties be explained during the orientation of new board members. The Task Force notes the importance of educating not just public members, but all board members, on principles of board governance.

The Task Force hopes that these recommendations will dispel the influence of constituencies, emphasize the fiduciary responsibilities of board members, and provide board members broader and more appropriate perspectives of their duties as members of the board.

<sup>8</sup> Note, however, that the Arizona Constitution contains two references to the SBA’s “board of governors.” One reference is in Art. 6, § 36, which requires that “board of governors of the state bar of Arizona [sic]” nominate five attorney members to the Commission on Appellate Court Appointments. Art. 6, § 41, contains a similar provision regarding the Commission on Trial Court Appointments. The Task Force proposes to address this in amended Rule 32(b)(1), which provides the following definition: “ ‘Board’ means Board of Trustees of the State Bar of Arizona, formerly known as the Board of Governors of the State Bar of Arizona.”

This suggested name change also presents a drafting challenge with regard to Rule 32(d)(8). That rule authorizes the Board of Governors to appoint a Board of Trustees for the Client Protection Fund. The Task Force’s proposed revision of Rule 32(d)(8) attempts to remove any ambiguity because of references to two sets of “trustees.” Moreover, the Task Force has been informed that the SBA may re-examine the Client Protection Fund’s structure in the near future, which would provide a further opportunity to remove ambiguities resulting from duplicate use of the word “trustees.”

## **Part V. Board of Legal Specialization**

The State Bar's Board of Legal Specialization ("BLS") administers a program for certifying attorneys as specialists in particular fields of law. Although this Task Force was not specifically directed to review particular SBA programs, *North Carolina State Board of Dental Examiners* prompted the Task Force to take note of the BLS. Some may conclude that the BLS presents a situation of market participants regulating entry into a competitive market process on behalf of the state. Accordingly, the Task Force inquired whether the BLS program provides sufficient Supreme Court oversight and supervision.

Among the Task Force concerns is that no specific Supreme Court rule directly establishes or authorizes the existence of the BLS. Rather, the existence of the BLS is acknowledged in Supreme Court Rule 42, ER 7.4(a) ("A lawyer shall not state or imply that the lawyer is a specialist except as follows: ... (3) a lawyer certified by the Arizona Board of Legal Specialization or by a national entity that has standards for certification substantially the same as those established by the board may state the area or areas of specialization in which the lawyer is certified.") ER 7.4(b) includes a similar reference to the BLS. The current practice allows the SBA board, not the Court, to designate specialty areas of practice. The members of the BLS are appointed by the SBA president with the approval of the board. An attorney dissatisfied with a decision of the BLS may appeal to the board, and three members of the board are designated by the president to hear the appeal. The rules and regulations of the BLS specify that it is "created by and subject to the continuing jurisdiction of the Board of Governors."

In response to concerns that adequate Supreme Court oversight is lacking, the Task Force proposes an amendment to Rule 32(d), the powers of the SBA board. This amendment would provide the Court's authorization for the SBA board to "administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 40." Proposed Rule 40 is contained in Appendix I. Rule 40 would establish Supreme Court supervision of the BLS in the follow ways:

- It would require the Court to appoint members of the BLS
- It would require Court approval of BLS rules, which would include rules concerning the designated practice areas of specialization and the qualifications for specialization
- It would provide an attorney aggrieved by a decision of the BLS the opportunity to seek judicial review



## **Part VI. Implementation of Task Force Recommendations**

Task Force recommendations concerning the SBA's mission and the fiduciary responsibilities of board members can be implemented upon adoption of the proposed amendments to Supreme Court Rule 32, as could proposed Rule 40.

Recommendations concerning the composition of the board should be implemented over time. The Task Force believes that no term of any currently elected or appointed board member or officer should be disrupted by the proposed changes. The Task Force recommends that the governance changes be implemented over three years. Appendix G contains an implementation proposal for each of the three suggested options for a newly composed board. Although implemented over three years, most of the governance changes would occur during the first year of implementation.

After the third year of implementation, one-third of the board members would come up for re-election or re-appointment every three years. The elections would become regular (i.e., every year of a three-year election cycle rather than two of every three years, as currently) and equal (the same number of elections and appointments would occur each year.)

The reduction in the number of officers should be implemented concurrently with the first year of the board that is elected and appointed under the proposed amendments to Rule 32.

If the Court adopts revisions to the governance provisions of Rule 32, the SBA should adopt conforming changes to its bylaws. This is a subject that would need to be addressed by the SBA's board.

## **Part VII. Conclusion**

The Task Force believes the recommendations in this report will have the following effects:

1. Clarify that the primary mission of the bar is to protect and serve the public.
2. Support efforts to maintain the SBA as an integrated bar association.
3. Reduce the size of the board, and make it more efficient and focused.
4. Increase proportionately the public's voice on the governing board.
5. Mitigate the effect of constituencies on elected board members.
6. Make turnover of elected and appointed board members more regular and predictable.
7. Make governance more understandable to SBA members, thereby increasing member interest in the bar and turnout at SBA elections.
8. Make individual board members more accountable and more aware of their fiduciary responsibilities.

The members of the Task Force are grateful for this opportunity to serve the Arizona Supreme Court, the State Bar of Arizona, and the citizens of Arizona, by advancing justice together.

**Appendix A: A.O. 2014-79**

IN THE SUPREME COURT OF THE STATE OF ARIZONA

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In the Matter of: )  
 )  
TASK FORCE ON THE REVIEW OF ) Administrative Order  
THE ROLE AND GOVERNANCE ) No. 2014 - 79  
STRUCTURE OF THE STATE )  
BAR OF ARIZONA )  
\_\_\_\_\_ )

The Arizona Supreme Court regulates the practice of law in Arizona. Under the Rules of the Arizona Supreme Court, the State Bar of Arizona is created as an integrated bar, generally requiring lawyers to be members of the State Bar of Arizona as a condition for practicing law within the State. The integrated State Bar is intended to regulate the legal profession to protect the public. Given the changes that have occurred in the legal services environment, the growth in Bar membership, and the demands placed on the State Bar, it is time to review the Bar’s mission and governance structure to ensure that they continue to best serve the public interest.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED establishing the Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona, as follows:

1. **Purpose.** The Task Force shall examine the Rules of the Supreme Court on the mission and governance structure of the State Bar of Arizona, and will make recommendations to the Court for changes, if needed, including but not limited to these areas:
  - a) Does the mission of the State Bar need to be clarified or modified?
  - b) Is the governance structure adequate to efficiently and effectively govern and carry out the duties of the Board?
  - c) Are Supreme Court Rules in the following areas related to Board structure and governance duties adequate to best serve the Board’s primary mission of protecting the public?

- i. Qualifications for membership on the Board of Governors;
- ii. Appointment, election and removal of members of the Board of Governors;
- iii. Term limits for members of the Board of Governors;
- iv. Election process;
- v. Board of Governors size and composition; and
- vi. State Bar leadership structure and composition.

2. **Membership.** The membership is attached as Appendix A. The Chief Justice may appoint additional members as needed or desired.

3. **Meetings:** The Task Force shall meet as necessary, and meetings may be scheduled, cancelled, or moved at the direction of the Task Force Chair. All meetings shall comply with the public meeting policy of the Arizona Judicial Branch, Arizona Code of Judicial Administration § 1-202. Meetings may include the conduct of public hearings to acquire input from members of the public and the Bar.

4. **Task Force Findings and Recommendations.** The Task Force shall file findings and recommendations with the Supreme Court of Arizona, to include any proposed rule changes, by September 1, 2015.

5. **Administrative Support.** The Administrative Office of the Courts shall provide administrative support and staff for the Task Force. The State Bar of Arizona will provide additional support as required, particularly in the areas of communication with the public and members of the Bar, and administrative support related to public hearings.

Dated this 29th day of July, 2014.

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SCOTT BALES  
Chief Justice

Attachment: Appendix A

**Appendix A**

**TASK FORCE ON THE REVIEW OF THE ROLE AND STRUCTURE OF THE STATE  
BAR OF ARIZONA**

*Chair*

**Justice Rebecca White Berch**  
Arizona Supreme Court

*Members*

**Paul Avelar**

**Ben Click**

**Lattie Coor**

**Amelia Craig Cramer**

**Whitney Cunningham**

**Christine Hall**

**Chris Herstam**

**Joseph Kanefield**

**Ed Novak**

**Gerald Richard**

**José Rivera**

**Marty Schultz**

**Hon. Sarah Simmons**

**Grant Woods**

*Staff Consultant*

**John Phelps**

## Appendix B: Recent changes to Supreme Court Rule 32

During the past 15 years, rule petitions have resulted in the following changes to Rule 32:

- R-02-0017 separated the SBA's governance provisions, formerly contained in Supreme Court Rule 31, into a new Supreme Court Rule 32. These amendments to Rule 32 maintained Rule 31's prior system of electing District 1, 3, 4, 5, and 7 board members in even years, and District 2, 6, and 8 board members in odd years. Under the rule as it existed in 2002, public members on the board were limited to serving no more than 2 terms, for a total of 4 years.
- R-02-0048 amended Rule 32(e) to provide for 3-year rather than 2-year terms for elected, public, and at-large members. It added an eligibility requirement that elected members be admitted to practice in Arizona for 5 years. It also allowed for electronic voting in board elections.
- R-03-0001 amended Rule 32(f) to provide that the first vice president whose term expires at the annual meeting would automatically become the president-elect.

## HASTINGS LAW JOURNAL

### *VOIR DIRE*



## Right-Sizing Bar Association Governance

Daniel R. Suhr\*

[M]ost nonprofit organizations would benefit from a thorough review of their board structure and operations. The chief aim of such a review would be for the organization to determine the optimal size, composition, and operating procedures that would assist the board in fulfilling its oversight duties. The review should address several key questions—first, for example, is the size of the board conducive to effective oversight?

-ABA Coordinating Committee on Nonprofit Governance, 2005<sup>1</sup>

### ii. Introduction

The State Bar of California is the largest bar association in the nation, with 232,000 members, a staff of nearly 600, and a \$62 million budget.<sup>2</sup> A unified bar, and thus an agency of the State of California,<sup>3</sup> it is currently governed by a board of 23 directors, with 6 public members and 17 attorney members appointed by the governor and legislative leadership.<sup>4</sup>

In September 2010, the governor and state legislature commissioned a task force to study governance reform for the State Bar.<sup>5</sup> Over the

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\* LL.M., Georgetown University; J.D., B.A., Marquette University. The Author appreciates comments from Professor John Olson, Jud Campbell, Alex Gesch, and Matt Glover. The views expressed here are those of the Author alone and do not reflect any position of his current or former employers. He may be reached via email at [daniel@danielsuhr.com](mailto:daniel@danielsuhr.com).

1. ABA Coordinating Comm. on Nonprofit Governance, *Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley* 21 (2005).

2. *The State Bar of California: What Does It Do? How Does It Work?*, St. B. Cal., <http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx> (last visited Jan. 10, 2012).

3. See Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 *Yale L. & Pol'y Rev.* 193, 197 (1996) (explaining that a unified bar association is one where state or court rule requires membership in order for a lawyer to practice in the state).

4. *Board of Governors*, St. B. Cal., <http://www.calbar.ca.gov/AboutUs/BoardofGovernors.aspx> (last visited Jan. 10, 2012).

5. State Bar of Cal., *Report and Recommendations of the State Bar of California*

course of the next eight months, the task force collected commentary from the bench, bar, professoriate, and public. The task force looked at “the size of the governing board, the composition and terms of its members, the selection process for Board members and the President, the qualifications of Board members, transparency of Board meetings, and the overall fundamental purpose of the State Bar in making public protection the governing board’s highest priority.”<sup>6</sup> In the end, it issued a 77-page report: The majority opinion recommended reconfiguring the governing board’s membership, though maintaining its size at 23, while the minority suggested shrinking it to 15 members.<sup>7</sup> In response, in June 2011 the California Senate Judiciary Committee chair introduced legislation with a 19-member compromise.<sup>8</sup>

This Essay evaluates both the task force’s report and bar association governance nationally in light of best practices for corporate and nonprofit governance. It focuses on one discrete issue: the optimal size for a bar association board. The verdict of academic and practitioner opinion is clear: for understandable reasons, smaller boards make for better boards. Yet it is also clear that most bar associations currently operate with bloated, inefficient boards. California should pursue a smaller governing board, and other bar associations, particularly those with significant staff and budgets, should undertake similar self-studies.

## I. Bar Governance and the California Report

As the California task force considered the optimal size and structure for a bar association board, it evaluated the structures of other state bars. Data collected by the ABA’s Division of Bar Services indicate that the average unified state bar’s board has 34 members; voluntary state bars average 60 members.<sup>9</sup> The largest board is New York with 260 members; the smallest is Idaho with 5 members. Large voluntary metropolitan bar associations have similarly large boards.<sup>10</sup>

In addition to state and local bar associations, there are a number of national bar associations. The ABA itself has 38 members on its board of governors, which meets quarterly to govern the \$200 million organization.<sup>11</sup>

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Governance in the Public Interest Task Force 1 (2011).

6. *Id.* at 1–2.

7. *Id.* at 3–4.

8. Kate Moser, *Senate OKs Compromise on Bar Governance*, Recorder (June 2, 2011), <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202496004478>.

9. ABA Div. for Bar Servs., 2010 State and Local Bar Dues, Fees & Member Benefits Survey 4–6 (2011). Incidentally, bar associations historically had smaller boards. Glenn R. Winters, *Bar Association Organization and Activities 13 (1954)* (stating that at the time, bar association governing boards generally had 5 to 15 members).

10. The Los Angeles County Bar Association, which with 27,000 members is the biggest local bar in the U.S., has a governing board of 38 members that meets monthly to supervise its \$13 million budget and 93 staff members. ABA Div. for Bar Servs., *supra* note 9, at 7. The New York City Bar Association, with 24,000 members, has a budget of \$13 million, has 118 employees, and is supervised by a board of 22. *Id.*

11. Ernst & Young LLP, *ABA Consolidated Financial Statements, Details of Consolidation, and Other Information 34* (2011), available at <http://www.americanbar.org/content/dam/aba/>



The ABA has 16 “affiliated organizations,” which are traditional bar associations based on shared personal attributes, such as ethnic heritage, or specialized areas of practice.<sup>12</sup> Among these organizations, the largest governing board has 111 members and the smallest has 10; they average 33 officers and directors.<sup>13</sup>

Due to their size and importance, two other organizations warrant particular mention. The American Association for Justice, representing the plaintiffs’ bar, has 187 members on its board of governors, which meets quarterly.<sup>14</sup> The Defense Research Institute, which represents the defense bar, has 45 officers and directors.<sup>15</sup>

The foregoing survey shows that bar associations almost universally have large governing boards: the 70 state and national bars included in this Essay’s survey average around 40 officers and directors. These boards are asked to govern significant organizations, with multimillion dollar budgets, scores of staff, and programming in numerous areas.<sup>16</sup> How do these figures compare with best practices for corporate and nonprofit governance?

## II. Why Academics and Organizations Agree

Over the past two decades, the for-profit and nonprofit worlds have been rocked by scandals at major institutions: Enron, WorldCom, the Red Cross, American University, and the Smithsonian Institution, just to name a few. At all of these organizations, boards of directors or trustees failed to exercise sufficient oversight while management ran amuck, resulting in tremendous damage.<sup>17</sup> In the wake of these controversies and

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administrative/aba/aba\_financials/2010auditfinstatements.authcheckdam.pdf (reporting that the ABA’s revenues for FY 2010 were approximately \$205 million); *Board of Governors General Information*, ABA, <http://www.americanbar.org/groups/leadership/governors.html> (last visited Jan. 10, 2012).

12. *Affiliated and Related Organizations*, ABA, [http://www.americanbar.org/utility/about\\_the\\_aba/affiliated\\_related\\_organizations.html](http://www.americanbar.org/utility/about_the_aba/affiliated_related_organizations.html) (last visited Jan. 10, 2012).

13. These figures come from computations made by the Author and are based on data he compiled about the 16 affiliated organizations.

14. *AAJ Board of Governors*, Am. Ass’n for Just., <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/2282.htm> (last visited Jan. 10, 2012).

15. *Board of Directors*, Def. Res. Inst., <http://www.dri.org/About/Leadership/DRI-BD> (last visited Jan. 10, 2012).

16. See generally ABA Div. for Bar Servs., 2009 Bar Activities Inventory (2009); Johnstone, *supra* note 3 (examining the organization and policies of bar associations). The average unified bar has a budget of \$13.5 million and a staff of 84. The average voluntary state bar has a budget of \$6 million and a staff of 37. ABA Div. for Bar Servs., *supra*, at 7–8.

17. See generally *The American Red Cross Governance Reform: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. (2007) (statement of Rep. Tom Lantos, Chairman, H. Comm. on Foreign Affairs); Brian L. Carpenter, Nat’l Charter Sch. Inst., *The Smithsonian Governance Debacle: Ten Lessons Charter School Boards Can Learn at Someone Else’s Expense* (2007); Reed Abelson, *Enron’s Collapse: The Directors; One Enron Inquiry Suggests Board Played Important Role*, N.Y. Times, Jan. 19, 2002, at C1; *Senator Threatens Legislative Action Against American U.’s Board*, Chron. Higher Educ. (May 17, 2006), <http://chronicle.com/article/Senator-Threatens-Legislative/37046>; Dick Thornburgh, Counsel, K&L Gates, and Court-Appointed Examiner in the WorldCom Bankruptcy Proceedings, *A Crisis in Corporate Governance? The WorldCom Experience*, Address Before the Executive Forum at the California Institute of Technology (Mar. 22, 2004).

the legislation they engendered (particularly Sarbanes-Oxley<sup>18</sup>), academics have undertaken significant studies on organizational governance. These studies have sought best practices to ensure engaged, active boards that take their fiduciary duties seriously and perform their monitoring and management functions well.<sup>19</sup>

The conclusion of those studies, as far as this Essay's particular topic is concerned, is almost uniform: the ideal board has "between 10(ish) and 15 (or so)" members.<sup>20</sup> Unfortunately, "very few, if any, nonprofit organizations fit this pattern. Indeed, many have boards that are several times larger than any model of good governance would suggest. And, in fact, some—certainly more than a few—have boards that are so large as effectively to be unmanageable."<sup>21</sup>

In recent years, several major national nonprofit organizations have reformed their governing boards to better reflect these nonprofit best practices. For instance, in 2006 the Nature Conservancy reduced its board of directors from 40 members to 18.<sup>22</sup> The Conservancy hired Ira Millstein, Associate Dean at the Yale School of Management, as its counsel.<sup>23</sup> He reported that "a 40-member Board could not govern effectively, no matter how qualified the members were; there were simply too many of them to operate as a modern, hands-on board."<sup>24</sup> The United Way of America reduced its board by approximately half, from 50 members to 26.<sup>25</sup> The American Red Cross is in the process of cutting its board from 50 members to no more than 20.<sup>26</sup>

The Red Cross, in coming to this decision, commissioned an authoritative report that surveyed the field of nonprofit governance regarding board size.<sup>27</sup> That report quotes Dean Millstein: "Generally, the non-profit sector, like the commercial sector, has come to recognize that smaller boards—which meet more frequently and have standing committees focused on particular issues relevant to the organization—

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18. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, & 29 U.S.C.).

19. See *infra* notes 20, 21, 25, 29, 32, and accompanying text.

20. Daniel L. Kurtz, *The Sarbanes-Oxley Act of 2002: Lessons for Nonprofits?*, in *Nonprofit Organizations Law 2003: Coping with the New Environment Post 9/11 & Sarbanes-Oxley* 79, 120 (PLI Tax Law & Estate Planning, Course Handbook Ser. No. J0-009A, 2003).

21. *Id.* Though there is near uniform agreement on this point, there are still a few dissenters. Some argue that there is no ideal board size for nonprofits because organizations are so different. See Panel on the Nonprofit Sector, *Strengthening Transparency, Governance, Accountability of Charitable Organizations* 77 (2005); see also BoardSource, *Report on the Size, Composition, and Structure of the Board of Regents* 41–42 (2008). A few reports explicitly defend large board sizes. See, e.g., Francie Ostrower, *Urban Inst., Nonprofit Governance in the United States* 17 (2007).

22. *The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Hearing Before the S. Comm. on Finance*, 109th Cong. 235 (2005) (statement of Ira M. Millstein, former chair of The Nature Conservancy's Governance Advisory Panel).

23. *Id.* at 231–32.

24. *Id.* at 233.

25. Am. Red Cross, *Governance for the 21st Century* 44–45 (2006).

26. *Id.* at 55; *Governance*, Am. Red Cross, <http://www.redcross.org/governance/> (last visited Jan. 10, 2012) ("[B]y 2012, Board membership will range from 12 to 20 . . .").

27. Am. Red Cross, *supra* note 25, at i.

are more effective than overly large boards.”<sup>28</sup> The report surveyed several expert sources recommending that nonprofit boards range from 3 to 15 members.<sup>29</sup> The report also looked at the trends in the for-profit sector and concluded that “[b]est governance practices in the for-profit context favor smaller boards” of approximately 9 to 12 members.<sup>30</sup>

The legal profession has produced several reports of its own that also recommend smaller boards for corporate and nonprofit organizations. Reflecting the “current recommendations for smaller, more effective ‘working’ boards,”<sup>31</sup> 5 different ABA publications recommend boards of directors ranging from 7 to 15 members.<sup>32</sup> Similarly, the American Law Institute’s draft *Principles of the Law of Nonprofit Organizations* looked at recommendations from other board surveys: S&P 500 companies (10.7 directors); the Society of Corporate Secretaries and Governance Professionals (9 for manufacturing companies, 11 for financial companies, and 10 for service companies); and hospitals and health systems (13 for nonprofit acute care hospitals, 7 for government hospitals, and 15 for community hospitals and hospital systems).<sup>33</sup>

This move to small boards is based on empirical research comparing the different organizational and interpersonal dynamics on large boards versus small boards. Large boards tend to run on parliamentary procedure (particularly when the board comprises a group of lawyers!) where speakers are called on and identified, rather than the conversational style possible on a small board. This conversational style allows for consensus to emerge more organically, after a full and vigorous discussion, whereas decisions on big boards are almost always made by a formal vote after a stilted and often shortened discussion.<sup>34</sup> Moreover, large boards allow for free-rider members who may attend a few meetings but who do not contribute to the actual governance of the organization: in the memorable

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28. *Id.* at 43.

29. *Id.* at 42–46 (collecting six studies). The report also cited the 2004 Nonprofit Governance Index. *Id.* at 44 n.217. The updated 2010 Index found that the average nonprofit board of directors has 16 members, and said that 15 to 22 members was the “sweet spot” for nonprofit board size.

BoardSource, Nonprofit Governance Index 2010, at 18–19 (2010).

30. Am. Red Cross, *supra* note 25, at 45.

31. ABA Coordinating Comm. on Nonprofit Governance, *supra* note 1, at 21.

32. *Id.* at 20 (suggesting 9 to 12 directors); ABA Corporate Laws Comm., Corporate Director’s Guidebook 42 (6th ed. 2011) (suggesting 7 to 11 directors); Gregory V. Varallo et al., Fundamentals of Corporate Governance 14 (2d ed. 2009) (citing a study recommending 8 to 9 directors); William G. Bowen, *Inside the Boardroom: A Reprise*, in Nonprofit Governance and Management 3, 5 (Victor Futter ed., 2002) (suggesting 10 to 15 directors); Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 Bus. Law. 59, 67 (1992) (recommending boards of 8 or 9, and not more than 10); see Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 Bus. Law. 921, 941 (1999) (reviewing literature arguing for small board size without delivering an independent conclusion).

33. Am. Law Inst., Principles of the Law of Nonprofit Organizations § 320 cmt. g(3), at 118 (Discussion Draft, 2006) (discussing a study of the board size and composition of S&P 500 companies); *id.* § 320 n.17 (same).

34. See Varallo et al., *supra* note 32, at 14; Kurtz, *supra* note 20, at 120–121; Lipton & Lorsch, *supra* note 32, at 65.

phrase of William O. Douglas, “directors who do not direct.”<sup>35</sup> By contrast, everyone on a small board needs to contribute for the board to complete its work.<sup>36</sup> Additionally, members of a small board have the opportunity to get to know one another, which fosters a sense of cohesion and collegiality. On a large board of 50 members, it is almost impossible to achieve this level of interpersonal intimacy among all the directors. Knowing one another as individuals helps directors operate more effectively as members of the board “team.”<sup>37</sup> Finally, disengaged and unwieldy boards simply transfer power to the CEO and other staff, who manage the organization without effective oversight.<sup>38</sup> On a smaller board, however, the CEO must work with engaged directors who hold him or her accountable through regular meetings in which the directors can make prompt decisions based on good information.<sup>39</sup> In short, these small-board dynamics increase the productivity and cohesion of the board, making it more efficient, effective, and collegial.

### III. The Future of Bar Governance Nationally and in California

The blue-ribbon Panel on the Nonprofit Sector makes the same recommendation as the ABA study quoted in the epigraph of this Essay: “Every charitable organization, as a matter of recommended practice, should review its board size periodically to determine the most appropriate size to ensure effective governance and to meet the organization’s goals and objectives.”<sup>40</sup> The first step for all bar

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35. In the relevant passage, Douglas discusses Horace Samuel, *Shareholders’ Money* 119–120 (1933): “Mr. Samuel observes that many of the directorates are ‘grossly swollen’, numbering from twenty to thirty-five. He concludes that barely ‘50 per cent really pull their weight’ at meetings . . .” William O. Douglas, *Directors Who Do Not Direct*, 47 *Harv. L. Rev.* 1305, 1320 (1934); see BoardSource, *supra* note 29, at 19 (“In larger boards, individual shortcomings may be more easily overlooked and performance issues such as spotty attendance may appear to have less of an impact. As board size goes up, attendance goes down. 90% of small boards have average attendance of 75%–100%, compared to 73% of large boards. Only 29% of large boards are prepared ‘to a great extent’ for meetings, compared to 39% for small and medium boards. 47% of large boards have meetings that allow adequate time ‘to a great extent’ to ask questions, compared to 55% and 58% respectively for medium and small boards.”).

36. See Bowen, *supra* note 32, at 5; Katherine O’Regan & Sharon M. Oster, *Does the Structure and Composition of the Board Matter? The Case of Nonprofit Organizations*, 21 *J.L. Econ. & Org.* 205, 208 (2005).

37. Lipton & Lorsch, *supra* note 32, at 65. For a discussion of boards as “teams,” see Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 *Vand. L. Rev.* 1 (2002).

38. Lumen N. Mulligan, *What’s Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 *Mich. L. Rev.* 1981, 1987 (2007) (citing O’Regan & Oster, *supra* note 36, at 216–19).

39. Kurtz, *supra* note 20, at 120; see Judith L. Miller, *The Board as a Monitor of Organizational Activity: The Applicability of Agency Theory to Nonprofit Boards*, 12 *Nonprofit Mgmt. & Leadership* 429, 439–42 (2002). This problem may be particularly pronounced in the bar association context, when the bar association president typically serves only a one-year term at the helm of the organization. See Johnstone, *supra* note 3, at 231 (discussing the limitations of the one-year term for presidents).

40. Panel on the Nonprofit Sector, *supra* note 21, at 75; see ABA Comm. on Nonprofit Corps., *Guidebook for Directors of Nonprofit Corporations* 233–34 (George W. Overton & Jeannie Carmedelle Frey eds., 2d ed. 2002) (recommending this sort of self-study on an automatic basis, every

associations, then—integrated and voluntary; national, state, and local; geographic, practice specialty, and shared heritage—is to undertake a self-study, as California has done.

When it comes to the size and composition of the board, the easy path is always to go bigger, to ensure that every type of firm and area of practice, every geographic region and stage of career, every section and division and county, is represented.<sup>41</sup> But representation of diverse constituencies is out of step with current best practices.<sup>42</sup> A focus on diversity stems from a belief that the main purpose of the board is to provide a forum for diverse perspectives and to pass resolutions through a representative assembly. But a more accurate understanding of the board's role recognizes that its primary responsibility is to govern—often to govern a large organization with tens or hundreds of thousands of members, millions of dollars, and scores of staff.<sup>43</sup> The counsel of the governance literature, which lawyers have helped produce, is clear: resist the temptation to go bigger, and instead move towards a smaller, “working” board.

Many boards deal with the problems inherent in a large board by transferring the actual power to govern to a smaller “executive committee” of the board.<sup>44</sup> The discussion draft for the ALI's *Principles of the Law of Nonprofit Organizations* cautions against such a move, recognizing it as a Band-Aid.<sup>45</sup> A better alternative would be to

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3 to 5 years).

41. See, e.g., N.Y. State Bar Ass'n Special Comm. on Ass'n Governance, Report and Recommendations to the Executive Committee on Matters of Association Governance 7 (2003) (“We believe that the Association would benefit from expanding the size of the Executive Committee [from 24] to 30 members. This expansion would be designed to promote more diversity in its broadest sense as well as provide additional, meaningful opportunities for more members to serve the Association.”); *Board of Trustees Report, July 16, 2010*, N.J. St. B. Ass'n, <http://www.njsba.com/about/njsba-reports/board-of-trustee-reports/july-16-2010.html> (last visited Jan. 10, 2012) (“[T]he Board of Trustees approved a measure to add seven seats to the body, bringing it to 51 members. . . . The proposal aims to foster diversity on the Board and give a larger voice to members of its sections and committees in governance and policy decisions by adding five at-large seats and two more representatives of State Bar sections and committees.”).

42. See Bowen, *supra* note 32, at 6 (“The case for diversity should not be construed in this way. If individuals believe that they are on a board to represent a defined group, or a particular point of view, they will not be what Quakers call ‘weighty’ members.”); Lipton & Lorsch, *supra* note 32, at 68 (“Some may argue that boards of this size will limit the range of viewpoints and ignore the need of our society for diversity in the boardroom. Our rejoinder is that five or six independent directors, who are carefully selected, should provide the breadth of perspective and diversity required.”). The other reason that nonprofits often have large boards is for fundraising—either to include key supporters on the board directly, or to have a large number of ambassadors for the organization who can go out and raise money. See Bowen, *supra* note 32, at 4. But for unified bar associations, there is no real need to fundraise because the association has guaranteed income in the form of member dues, as every lawyer who wishes to practice in the state must join the association. Cf. Johnstone, *supra* note 3, at 197 (“Most bar association income comes from annual dues.”). And for voluntary bars, this purpose can just as easily be accomplished by a membership or sponsorship committee that is not part of the governing board.

43. See Grant Thornton, LLP, Report on the Corporate Governance of the Utah State Board of Commissioners 7 (2007) (identifying governance as the primary purpose of the Utah State Bar Board of Commissioners).

44. See Am. Law Inst., *supra* note 33, § 320 cmt. g(3).

45. *Id.*

complement a small board of directors with an advisory board or policy board that represents the profession and develops the state bar's position on legal and legislative issues while the board of directors actually manages the organization.<sup>46</sup>

A few bar associations have taken steps to reform their leadership structure. In 1998, the Orange County Bar Association ("OCBA") undertook a strategic planning review that specifically asked whether the board's size was an "impediment to individual board member participation or an impediment to quick and decisive decisions."<sup>47</sup> OCBA decided to reduce its governing board from 39 to 25 members.<sup>48</sup> According to the president who pushed for the change:

Our size, we believe, is the single biggest contributor to the lack of efficiency and meaningful participation of the board, and the single greatest impediment to our creating a more thriving and vibrant Board of Directors. . . . Our size is simply too large to have meaningful discussions and debate of policy.<sup>49</sup>

In 2004, The Minnesota State Bar Association reformed its entire governance structure, merging four layers into two: a 128-member Assembly that meets quarterly and a 15-member Council that meets more regularly.<sup>50</sup> Similarly, an ABA news report notes that after a significant reform by the Law Society of Manitoba, which halved its governing board and changed its responsibilities,

[the Society's CEO] cites dramatic improvement and says the success of the new plan is measurable. The board operates in a way that is "more timely, better, and cheaper," he says. And since the reorganization six years ago, the society has saved so much money it has had the unusual luxury of *lowering* its dues every year.<sup>51</sup>

These examples illustrate the possibilities for reform. While numerous other major nonprofit organizations have undertaken fundamental governance reform, only a few bar associations have joined them and aligned their governance with best practices for nonprofits.

### iii. Conclusion

Major institutions in American society have been rocked by scandal in the past decade. Many of these fiascos stemmed from a failure of governance by the board of directors, which had ultimate responsibility for each organization. Either because of legislation (Sarbanes-Oxley) or

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46. See ABA Coordinating Comm. on Nonprofit Governance, *supra* note 1, at 21.

47. *Strategic Plan*, Orange County B. Ass'n, <http://www.ocbar.org/About/StrategicPlan.aspx> (last visited Jan. 10, 2012).

48. Raymond T. Elligett, Jr., *Restructuring Governance of Your Bar Association*, Conf. Call, Fall 2005.

49. Kimberly Smith, *The Reorganized Bar: An Inside Look at Change*, B. Leader, Sept./Oct. 2004, at 10, 12, available at [http://www.americanbar.org/publications/bar\\_leader\\_home/bar\\_leader\\_archive/2901.html](http://www.americanbar.org/publications/bar_leader_home/bar_leader_archive/2901.html).

50. *Id.* at 12–13; see *Assembly Meetings/Minutes*, Minn. St. B. Ass'n, <http://www2.mnbar.org/governance/assembly/meetings.asp> (last visited Jan. 10, 2012); *Organizational Structure*, Minn. St. B. Ass'n, <http://www2.mnbar.org/governance/CommonFiles/OrgChart.pdf> (last visited Jan. 10, 2012).

51. Smith, *supra* note 49, at 11.

pressure from shareholders and stakeholders, institutions ranging from the American Red Cross to American University have undertaken governance reforms to ensure effective management and oversight. Often these reforms included fundamental structural change, such as much smaller, working boards of directors.

Governance experts agree that boards should be small. These scholarly recommendations are confirmed by the experiences of many large nonprofit organizations and for-profit corporations. They are shared by several publications from different sections and committees of the ABA and American Law Institute. Yet these recommendations remain unimplemented in the vast majority of bar associations.

Thus far, no bar association has suffered the kind of scandal that has affected other sectors. However, many bars operate with ill-structured, hands-off boards that almost necessarily delegate significant power to management. These boards are unwieldy, ineffective, and out of step with best practices for corporate and nonprofit governance. This problem stems from a fundamental misunderstanding about the role and goal of the board. Contrary to the assumptions that lead to bloated boards, the role of a bar association's board is not to be a representative legislative assembly, but rather to be the governing body atop a significant organization with thousands of members, millions of dollars, and scores of staff. When bar leaders consider their role in that light, they may start to take their own advice and move to smaller, more effective boards that play a vital role in the organization's operations and strategic direction. Bar associations should follow California's lead by undertaking self-study evaluations. And the conclusion of those studies should be a course of action similar to that taken by Minnesota: a smaller board of directors that actually governs, and a larger representative assembly to speak for the profession on legal and legislative issues.

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**Appendix D: Demographic and “per board member” tables**

**(1) Demographic table**

**Arizona population and the number of active SBA members, by county**

| County                             | Population<br>(2014 U.S.<br>census est.) | % of<br>statewide<br>population | Active SBA<br>members<br>(July 2014) | % of in-state<br>active<br>attorneys | % of total<br>active<br>attorneys |
|------------------------------------|--|---------------------------------|--------------------------------------|--------------------------------------|-----------------------------------|
| <b>Apache</b>                      | 71,828                                   | 1.0                             | 31                                   | 0.2                                  | 0.2                               |
| <b>Cochise</b>                     | 127,448                                  | 1.9                             | 102                                  | 0.7                                  | 0.6                               |
| <b>Coconino</b>                    | 137,682                                  | 2.0                             | 240                                  | 1.6                                  | 1.3                               |
| <b>Gila</b>                        | 53,119                                   | 0.8                             | 45                                   | 0.3                                  | 0.3                               |
| <b>Graham</b>                      | 37,957                                   | 0.6                             | 24                                   | 0.2                                  | 0.1                               |
| <b>Greenlee</b>                    | 9,346                                    | 0.1                             | 3                                    | 0.1                                  | 0.1                               |
| <b>La Paz</b>                      | 20,231                                   | 0.3                             | 22                                   | 0.1                                  | 0.1                               |
| <b>Maricopa</b>                    | 4,087,191                                | 60.7                            | 11,581                               | 75.9                                 | 65.1                              |
| <b>Mohave</b>                      | 203,361                                  | 3.0                             | 143                                  | 0.9                                  | 0.8                               |
| <b>Navajo</b>                      | 108,101                                  | 1.6                             | 80                                   | 0.5                                  | 0.4                               |
| <b>Pima</b>                        | 1,004,516                                | 14.9                            | 2,320                                | 15.2                                 | 13.0                              |
| <b>Pinal</b>                       | 401,918                                  | 6.0                             | 204                                  | 1.3                                  | 1.1                               |
| <b>Santa Cruz</b>                  | 46,695                                   | 0.7                             | 49                                   | 0.3                                  | 0.3                               |
| <b>Yavapai</b>                     | 218,844                                  | 3.3                             | 274                                  | 1.8                                  | 1.5                               |
| <b>Yuma</b>                        | 203,247                                  | 3.0                             | 142                                  | 0.9                                  | 0.8                               |
| <b>Subtotal<br/>(in-state)</b>     | --                                       | --                              | 15,260<br>(in-state)                 | --                                   | 85.8                              |
| <b>Subtotal<br/>(out-of-state)</b> | --                                       | --                              | 2,533<br>(out-of-state)              | --                                   | 14.2                              |
| <b>Total</b>                       | 6,731,484                                | 100%                            | 17,793                               | 100%                                 | 100%                              |

**Court of Appeals, Division One (except Maricopa):**

- Population: 963,294 [14.3%]
- Active attorneys: 932 [6.1% of in-state active, 5.2% of total active]

**Court of Appeals, Division Two (except Pima):**

- Population: 676,483 [10.0%]
- Active attorneys: 427 [2.8% of in-state active, 2.4% of total active]

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**(2) “Per board member” tables**

The following tables show the number of people and attorneys “represented” by one elected board member in the district. The population and attorneys shown in these “per board member” tables is a fraction of a district’s total, as shown in the demographic table above, if a district has more than one board member.



**The board’s current composition with eight election districts, and 18 elected governors, has one elected governor for every:**

| District | Counties                         | Population | Attorneys | # of board members |
|----------|----------------------------------|------------|-----------|--------------------|
| 1        | Mohave, Navajo, Coconino, Apache | 520,972    | 494       | 1 governor         |
| 2        | Yavapai                          | 218,844    | 274       | 1 governor         |
| 3        | Gila, Graham, Greenlee           | 100,422    | 72        | 1 governor         |
| 4        | Cochise                          | 127,488    | 102       | 1 governor         |
| 5        | Pima, Santa Cruz                 | 350,403    | 790       | 3 governors        |
| 6        | Maricopa                         | 454,132    | 1,287     | 9 governors        |
| 7        | La Paz, Yuma                     | 223,478    | 164       | 1 governor         |
| 8        | Pinal                            | 401,918    | 204       | 1 governor         |

**Option X and Y proposals with a single “statewide” election district, and six elected trustees, would have one elected trustee for every:**

| District  | Counties | Population | Attorneys | # of board members |
|-----------|----------|------------|-----------|--------------------|
| Statewide | All      | 1,121,914  | 2,543     | 6 trustees         |

**Option X and Y proposals with four election districts, and six elected trustees, would have one trustee for every:**

| District                   | Counties  | Population | Attorneys | # of board members |
|----------------------------|---|------------|-----------|--------------------|
| Div. One (except Maricopa) | Mohave, Navajo, Coconino, Apache, Yavapai, La Paz, Yuma | 963,294    | 932       | 1 trustee          |
| Div. Two (except Pima)     | Gila, Graham, Greenlee, Cochise, Santa Cruz, Pinal      | 676,483    | 427       | 1 trustee          |
| Maricopa                   | Maricopa  | 1,362,397  | 3,860     | 3 trustees         |
| Pima                       | Pima  | 1,004,516  | 2,320     | 1 trustee          |

**Option Z proposal with five election districts, and eleven elected trustees, would have one elected trustee for every:**

| District  | Counties   | Population | Attorneys | # of board members |
|-----------|--|------------|-----------|--------------------|
| North     | Mohave, Navajo, Coconino, Apache                   | 520,972    | 494       | 1 trustee          |
| West      | Yavapai, La Paz, Yuma                              | 442,322    | 438       | 1 trustee          |
| Southeast | Gila, Graham, Greenlee, Cochise, Santa Cruz, Pinal | 676,483    | 427       | 1 trustee          |
| Maricopa  | Maricopa   | 681,199    | 1,930     | 6 trustees         |
| Pima      | Pima   | 502,258    | 1,160     | 2 trustees         |

**Appendix E: Summary Table of Task Force Revisions to Supreme Court Rule 32**

**Unless otherwise noted, the following recommendations are for the Arizona Supreme Court.**

| Rec #<br>Report<br>Pg.     | Recommendation  | Rule 32     | Provision   |
|----------------------------|---|-------------|---|
| <b>Part III: Mission</b>   |   |             |   |
| #1<br>Pg. 9                | The Arizona Supreme Court should amend Rule 32(a) to clarify that the SBA's primary mission is to protect and serve the public. | 32(a)(2)    | "The primary mission of the State Bar of Arizona is to protect and serve the public. This mission includes responsibilities to improve the legal profession, and to advance the rule of law and the administration of justice." |
| #2<br>Pg. 9                | Restyle and organize Rule 32(a).  | 32(a)       | All   |
| #3<br>Pgs. 9-12            | The SBA should continue as an integrated bar association.   | 32(a)(2)    | "Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules."   |
| <b>Part IV: Governance</b> |   |             |   |
| #4<br>Pgs. 14, 16          | The board should have a greater proportion of appointed board members.  | 32(e)       | See recommendations #7, 8, and 9 below.   |
| #5<br>Pgs. 16, 19          | The ASC should appoint public members who are nominated by the board.   | 32(e)(3)(A) | "Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court."   |
| #6<br>Pg. 19               | Adopt a 3-year election and appointment cycle.  | 32(e)(1)    | "The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year."  |

| Rec #<br>Report<br>Pg. | Recommendation  | Rule 32          | Provision   |
|------------------------|---|------------------|---|
| #7<br>Pg. 19           | <b>Option X:</b> 15 member board with 6 elected members from 4 districts and 9 appointed members (3 public + 6 at-large).                                       | 32(e)            | "The board is composed of <u>six elected trustees and nine appointed trustees</u> , as provided by this Rule." [Etc.]   |
| #8<br>Pg. 20           | <b>Option Y:</b> 18 member board with 6 elected members from 4 districts and 12 appointed members (6 public + 6 at-large).                                      | 32(e)            | "The board is composed of <u>six elected trustees and twelve appointed trustees</u> , as provided by this Rule." [Etc.]   |
| #9<br>Pg. 20           | <b>Option Z:</b> 18 member board with 11 elected members from 5 districts and 7 appointed members (4 public + 3 at-large).                                      | 32(e)            | "The board is composed of <u>eleven elected trustees and seven appointed trustees</u> , as provided by this Rule." [Etc.]   |
| #10<br>Pg. 22          | Allow active out-of-state members of the SBA to vote in SBA board elections.  | 32(e)(2)(D)      | "Active out-of-state members may vote in the district of their most recent Arizona residence or place of business or, if none, in the Maricopa County District. "           |
| #11<br>Pgs. 22-23      | The immediate past president should serve a 1-year term as an advisor to the board.   | 32(f)(4)         | "The immediate past president of the board will serve a one-year term as an advisor to the board."  |
| #12<br>Pg. 23          | Discontinue the board seat of the Young Lawyers Section president.  | Not included     | Not included in Rule 32.  |
| #13<br>Pgs. 24-25      | Discontinue the ex officio board membership of the law school deans.  | Not included     | Not included in Rule 32.  |
| #14<br>Pg. 24          | Continue service of an associate justice as a liaison to the board.   | Unwritten policy | Not included in Rule 32.  |
| #15<br>Pg. 24          | All elected board members have a limit of 3 terms of 3 years each, and may not be a candidate for a fourth term until 3 years have passed after the ninth year. | 32(e)(2)(F)      | "An elected trustee may serve three consecutive terms, but may not be a candidate for a fourth term until three years have passed after the person's last year of service." |

| Rec #<br>Report<br>Pg. | Recommendation  | Rule 32                   | Provision  |
|------------------------|---|---------------------------|--|
| #16<br>Pgs. 24-<br>25  | An attorney member of the board must have a clean disciplinary history for 5 years preceding board service.   | 32(e)(2)(B)               | "Each elected trustee must have been an active State Bar member, and have had no record of formal discipline, for five years prior to election to the board."  |
| #17<br>Pg. 25          | An attorney member of the board who is the subject of a formal disciplinary complaint must be recused from serving on the board pending disposition of the complaint. | Add to<br>SBA by-<br>laws | Not included in Rule 32.   |
| #18<br>Pg. 25          | A board member may be removed for good cause by a two-thirds vote of the board.   | 32(e)(5)                  | "A trustee of the board may be removed for good cause by a vote of two-thirds or more of the trustees cast in favor of removal. Good cause for removal exists if a trustee undermines board meetings or compromises the integrity of the board. Expression of unpopular views does not constitute good cause. Good cause also may include, but is not limited to, conviction of a felony or a crime involving moral turpitude, imposition of a formal discipline sanction, repeatedly ignoring the duties of a trustee, or disorderly activity during a board meeting. A board trustee so removed may, within thirty days of the board's action, file a petition pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure requesting that the Supreme Court review the board's determination of good cause. The Supreme Court will expedite consideration of the petition." |

| Rec #<br>Report<br>Pg. | Recommendation  | Rule 32     | Provision  |
|------------------------|---|-------------|--|
| #19<br>Pgs. 25-<br>26  | The board should elect 3 officers: a president, president-elect, and secretary-treasurer. An appointed member may serve as an officer.  | 32(f)(1)    | “The board will elect its officers. The officers are a president, a president-elect, and a secretary-treasurer. An elected or appointed trustee may serve as an officer.”  |
| #20<br>Pg. 26          | Each office should be held for a one-year term.   | 32(f)(2)(C) | “Each officer will serve a one-year term.”   |
| #21<br>Pg. 26          | A member may not be elected to a particular office to a second term for any office that the member has held during nine or fewer years of consecutive board service.  | 32(f)(2)(D) | “An officer may not be elected to a second term for any office that the trustee has held during the preceding nine or fewer consecutive years of service on the board.”  |
| #22<br>Pg. 24          | <p>If a board member who is otherwise term-limited is the “president-elect” or president that this not preclude the person from continuing to serve on the board until completion of their term as president. Upon completing the term as president, a new board member will be elected or appointed for the remaining partial term.</p> <p>If automatic succession extends the person’s term of service on the board beyond the time otherwise provided by Rule 32, then upon completion of the term as president, a special election will be held in the person’s district to elect, or in the case of an appointed member the Court will appoint, a new board member for the remaining partial term.</p> | 32(f)(2)(E) | “The term of an trustee chosen as president or president-elect automatically extends until completion of a term as president, if his or her term as a trustee expires in the interim without their reelection or reappointment to the board, or if the term is limited under Rule 32(e)(2)(F). In either of these events, there shall not be an election or appointment of a new trustee for the seat held by the president or president-elect until the person has completed his or her term as president, and then the election or appointment of a successor trustee shall be for a partial term that otherwise remains in the regular three-year cycle under Rule 32(e)(1).” |

| Rec #<br>Report<br>Pg. | Recommendation  | Rule 32                   | Provision  |
|------------------------|---|---------------------------|--|
| #23<br>Pg. 26          | The immediate past president should lead a committee to recruit and vet the best candidates for officer positions.  | 32(f)(4)                  | "The board advisor, with the assistance of two or more trustees chosen by the president, will lead a committee to recruit, recommend, and nominate candidates for the offices of president-elect and secretary-treasurer." |
| #24<br>Pgs. 26-27      | Change the name from board of governors to board of trustees.   | 32(b)(1)<br><br>and 32(e) | "'Board' means Board of Trustees of the State Bar of Arizona."<br><br>"The governing board of the State Bar of Arizona is a board of trustees."  |
| #25<br>Pg. 27          | Provide an oath for all board members upon assuming board duties.   | 32(e)(4)                  | "Upon commencing service, each trustee, whether elected or appointed, must take an oath to faithfully and impartially discharge the duties of a trustee."  |
| #26<br>Pg. 27          | Include fiduciary responsibilities in the orientation of board members.   | Not included              | --   |
| #27<br>Pg. 19          | Notwithstanding the board's nomination of public members, the Court may decline to appoint any board nominee and may appoint as a public trustee a person not nominated by the board. | 32(e)(3)(A)               | "The Court may decline to appoint any board nominee; and may appoint as a public trustee a person who was not nominated by the board."   |

## Appendix F: Revisions to Supreme Court Rule 32

### Clean version of proposed Rule 32:

#### **Rule 32. Organization of the State Bar of Arizona**

(a) **State Bar of Arizona.** The Supreme Court of Arizona maintains under its direction and control a corporate organization known as the State Bar of Arizona.

(1) **Practice of law.** Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules.

(2) **Mission.** The primary mission of the State Bar of Arizona is to protect and serve the public. This mission includes responsibilities to improve the legal profession and to advance the rule of law and the administration of justice. To accomplish its mission, this Court empowers the State Bar of Arizona, under the Court's supervision, the authority to

(A) Organize and promote activities that best fulfill the responsibilities of the legal profession and its individual members to the public;

(B) Promote access to justice for those who live, work, and do business in this state;

(C) Aid the courts in the administration of justice;

(D) Assist this Court with the regulation and discipline of persons engaged in the practice of law; foster on the part of those engaged in the practice of law ideals of integrity, learning, competence, public service, and high standards of conduct; serve the professional needs of its members; and encourage practices that best uphold the honor and dignity of the legal profession;

(E) Conduct educational programs regarding substantive law, best practices, procedure, and ethics; provide forums for the discussion of subjects pertaining to the administration of justice, the practice of law, and the science of jurisprudence; and report its recommendations to this Court concerning these subjects.

(b) **Definitions.** Unless the context otherwise requires, the following definitions shall apply to the interpretation of these rules relating to admission, discipline, disability and reinstatement of lawyers:

(1) “Board” means Board of Trustees of the State Bar of Arizona, formerly known as the Board of Governors of the State Bar of Arizona.

(2) through (8) [no change]

➤ *Except:*

Recommend capitalizing the “b” in “State Bar.”

(c) **Membership.** [No change]

➤ *Except:*

Recommend capitalizing the “s” and the “b” in “State Bar” consistently.

Recommend changing “Board of Governors” in section (c)(7) to  
“Board of Trustees”

(d) **Powers of Board.** The State Bar shall be governed by a Board of Trustees, which shall have the powers and duties prescribed by this Court. The board shall:

(1) Fix and collect, as provided in these rules, fees approved by the Supreme Court, which shall be paid into the treasury of the State Bar.

(2) Promote and aid in the advancement of the science of jurisprudence, the education of lawyers, and the improvement of the administration of justice.

(3) Approve budgets and make appropriations and disbursements from funds of the State Bar to pay necessary expenses for carrying out its functions.

(4) Formulate and declare rules and regulations not inconsistent with Supreme Court Rules that are necessary or expedient to enforce these rules, and by rule fix the time and place of State Bar meetings and the manner of calling special meetings, and determine what number shall constitute a quorum of the State Bar.

(5) Appoint a Chief Executive Office/Executive Director to manage the State Bar’s day-to-day operations.

(6) Appoint from time to time one or more executive committees composed of members of the board and vest in the executive committees any powers and duties granted to the board as the board may determine.

(7) Prepare an annual statement showing receipts and expenditures of the State Bar for the twelve preceding months. The statement shall be promptly certified by the secretary-treasurer and a certified public accountant, and transmitted to the Chief Justice of this Court.

(8) Create and maintain the Client Protection Fund, as required by this Court and authorized by the membership of the State Bar on April 9, 1960, said fund to exist



and be maintained as a separate entity from the State Bar in the form of the Declaration of Trust established January 7, 1961, as subsequently amended and as it may be further amended from time to time by the board. The trust shall be governed by a separate board of trustees appointed by the State Bar Board of Trustees in accordance with the terms of the trust. The trustees of the Client Protection Fund shall govern and administer the Fund pursuant to the provisions of the trust, and in accordance with other procedural rules as may be approved by the State Bar Board of Trustees.

(9) Implement and administer mandatory continuing legal education in accordance with Rule 45.

(10) Administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 40.

- **Immediately below is SECTION (e), OPTION X (see subsequent pages for Option Y and Option Z). Underlining in Section (e) highlights differences in the three options.**

**(e) Composition of the Board.** The governing board of the State Bar of Arizona is a board of trustees. The board is composed of six elected trustees and nine appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** Each elected trustee must be an active member of the State Bar of Arizona throughout the elected term. Each elected trustee must have been an active State Bar member, and have had no record of formal discipline, for five years prior to election to the board.

**(C) Nominations.** Nominations for elected trustees shall be by petition signed by at least five active State Bar members. Each candidate named in a petition and

all members signing a petition must have their main offices in the district in which the candidate seeks to be elected.

**(D) Elections.** Election of trustees must be by ballot. Active and judicial members are entitled to vote for the elected trustee or trustees in the district in which a member has his or her principal place of business, as shown in the records of the State Bar. Active out-of-state members may vote in the district of their most recent Arizona residence or place of business or, if none, in the Maricopa County District. The State Bar must send ballots electronically to each member entitled to vote, at the address shown in the records of the State Bar, at least two weeks prior to the date of canvassing the ballots. Members must return their ballots through electronic voting means, and the State Bar will announce the results at the ensuing annual meeting. The State Bar's by-laws will direct other details of the election process.

**(E) Terms of service.** Elected trustees serve a three-year term. An elected trustee serves on the board until a successor is elected and takes office at the annual meeting. If the board receives notice that an elected trustee's principal place of business has moved from the district in which the trustee was elected, or that the trustee has died, become disabled, or is otherwise unable to serve, that trustee's seat is deemed vacant, and the other elected and appointed trustees will chose a successor by a majority vote.

**(F) Term limits.** An elected trustee may serve three consecutive terms, but may not be a candidate for a fourth term until three years have passed after the person's last year of service. Election or appointment to a partial term of less than three years will not be included in a calculation of a member's term limit.

**(3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as "appointed trustees," to serve on the board.

**(A) Public trustees.** Three trustees of the board are designated as "public" trustees. The public trustees must not be members of the State Bar and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. The Court may reappoint a public trustee for one additional term of three years. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a

public member to a term of less than three years will not be included in a calculation of the member's term limit.

**(B) At-large trustees.** Six trustees on the board are designated as "at-large" trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

**(4) Oath of trustees.** Upon commencing service, each trustee, whether elected or appointed, must take an oath to faithfully and impartially discharge the duties of a trustee.

**(5) Removal of a trustee.** A trustee of the board may be removed for good cause by a vote of two-thirds or more of the trustees cast in favor of removal. Good cause for removal exists if a trustee undermines board meetings, or compromises the integrity of the board. Expression of unpopular views does not constitute good cause. Good cause also may include, but is not limited to, conviction of a felony or a crime involving moral turpitude, imposition of a formal discipline sanction, repeatedly ignoring the duties of a trustee, or disorderly activity during a board meeting. A board trustee so removed may, within thirty days of the board's action, file a petition pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure requesting that the Supreme Court review the board's determination of good cause. The Supreme Court will expedite consideration of the petition.

**(6) Recusal of an attorney trustee.** An attorney board member who is the subject of a formal disciplinary complaint must recuse him or herself from serving on the board pending disposition of the complaint.

**(f) Officers of the State Bar.**

**(1) Officers.** The board will elect its officers. The officers are a president, a president-elect, and a secretary-treasurer. An elected or appointed trustee may serve as an officer.

**(2) Terms of office.**

**(A) President.** The term of the president will expire at the conclusion of the annual meeting. The president-elect whose term expired at the same annual meeting will then automatically become, and assume the duties of, president at that time.

- (B) President-elect and secretary-treasurer.** The board must elect a new president-elect and a new secretary-treasurer at each annual meeting. Those newly elected officers will assume their respective offices at the conclusion of the annual meeting at which they are elected, and they will continue to hold their offices until the conclusion of the subsequent annual meeting at which their successors are elected.
- (C) Length of term.** Each officer will serve a one-year term.
- (D) Successive terms.** A trustee may not be elected to a second term for any office that the trustee has held during the preceding nine or fewer consecutive years of service on the board.
- (E) Limitations.** The term of an trustee chosen as president or president-elect automatically extends until completion of a term as president if his or her term as a trustee expires in the interim without their reelection or reappointment to the board, or if the term is limited under Rule 32(e)(2)(F). In either of these events, there shall not be an election or appointment of a new trustee for the seat held by the president or president-elect until the person has completed his or her term as president, and then the election or appointment of a successor trustee shall be for a partial term that otherwise remains in the regular three-year cycle under Rule 32(e)(1).
- (3) Duties of officers.** The president will preside at all meetings of the State Bar and of the board of trustees, and if absent or unable to act, the president-elect will preside. Additional duties of the president, president-elect, and secretary-treasurer may be prescribed by the board or set forth in the State Bar by-laws.
- (4) Board advisor.** The immediate past president of the board will serve a one-year term as an advisor to the board. The advisor may participate in board discussions but has no vote at board meetings. The board advisor, with the assistance of two or more trustees chosen by the president, will lead a committee to recruit, recommend, and nominate candidates for the offices of president-elect and secretary-treasurer.
- (5) Removal from office.** An officer may be removed from office, with or without good cause, by a vote of two-thirds or more of the members of the board of trustees cast in favor of removal.
- (6) Vacancy in office.** A vacancy in any office before expiration of a term may be filled by the board of trustees at a meeting called for that purpose.

- (g) Annual meeting [No change]
- (h) Administration of rules [No change]
- (i) Filings made [No change]
- (j) Formal Requirements of Filings [No change]
- (k) Payment of Fees and Costs [No change]
- (l) Expenses of Administration and Enforcement [No change]

➤ SECTION (e)(1-3), OPTION Y:

**(e) Composition of the Board.** The State Bar of Arizona is governed by a board of trustees. The board is composed of six elected trustees and twelve appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule, or their proxies as provided by the State Bar's by-laws, are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** [No change from Option X]

**(C) Nominations.** [No change from Option X]

**(D) Elections.** [No change from Option X]

**(E) Terms of service.** [No change from Option X]

**(F) Term limits.** [No change from Option X]

**(3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.

**(A) Public trustees.** Six trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member’s term limit.

**(B) At-large trustees.** Six trustees on the board are designated as “at-large” trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

➤ **SECTION (e)(1-3), OPTION Z:**

**(e) Composition of the Board of Trustees.** The State Bar of Arizona is governed by a board of trustees. The board is composed of eleven elected trustees and seven appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule, or their proxies as provided by the State Bar’s by-laws, are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from five districts, as follows:

- i. Maricopa County District: six trustees;
- ii. West District (Yavapai, Yuma, and La Paz Counties): one trustee;
- iii. North District (Mohave, Coconino, Navajo, and Apache Counties): one trustee;
- iv. Pima County District: two trustees; and

- v. Southeast District: Pinal, Gila, Graham, Santa Cruz, Cochise, and Greenlee Counties): one trustee.

**(B) Qualifications.** [No change from Option X]

**(C) Nominations.** [No change from Option X]

**(D) Elections.** [No change from Option X]

**(E) Terms of service.** [No change from Option X]

**(F) Term limits.** [No change from Option X]

- (3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.

**(A) Public trustees.** Four trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member’s term limit.

**(B) At-large trustees.** Three trustees on the board are designated as “at-large” trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

## **Appendix G: Implementation Tables**

### **Current composition of the SBA governing board:**

| District # | District area                          | # of board members |
|------------|--|--------------------|
| 1          | Mohave, Navajo, Coconino, Apache       | 1                  |
| 2          | Yavapai                                | 1                  |
| 3          | Gila, Graham, Greenlee                 | 1                  |
| 4          | Cochise                                | 1                  |
| 5          | Pima, Santa Cruz                       | 3                  |
| 6          | Maricopa                               | 9                  |
| 7          | La Paz, Yuma                           | 1                  |
| 8          | Pinal                                  | 1                  |
| YLS pres.  | Elected by YLS                         | 1                  |
| IPP        | Ex officio member (non-voting)         | 1                  |
| Public     | Appointed by the SBA                   | 4                  |
| At-large   | Appointed by the ASC                   | 3                  |
| LSD        | Law school dean liaisons (non-voting)  | 3                  |
| AJ         | Associate justice liaison (non-voting) | --                 |

### **Current board by status:**

|    |  |
|----|--|
| 19 | Elected board members, including YLS president |
| 4  | Public members                                 |
| 3  | At-large members                               |
| 4  | Ex officio members                             |
| 30 | Total size of the board                        |



## IMPLEMENTATION OF OPTION X

### 2019:

| District     | District area  | # of board members |
|--------------|--|--------------------|
| Division 1   | Elect 1 trustee to a 1-year term   | 1                  |
| Division 2   | Elect 1 trustee to a 2-year term   | 1                  |
| Maricopa     | Elect 1 trustee to a 1-year term, 1 trustee to a 2-year terms, and 1 trustee to a 3-year term  | 3                  |
| Pima         | Elect 1 trustee to a 3-year term   | 1                  |
| ASC public   | Appoint 1 trustee to a 1-year term, 1 trustee to a 2-year term, and 1 trustee to a 3-year term | 3                  |
| ASC at-large | Appoint 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms | 6                  |
| YLS pres.    | Discontinued   | 0                  |
| LSD          | Discontinued   | 0                  |
| IPP          | "Advisor" (non-voting - not a trustee)   | 0                  |
| AJ           | "Liaison" (non-voting - not a trustee)   | 0                  |

**2019 total board size is 6 elected + 9 appointed = 15 trustees**

### 2020:

Trustees who in 2019 were elected or appointed to 1-year terms may request re-election or re-appointment to 3-year terms

### 2021:

Trustees who in 2019 were elected or appointed to 2-year terms may request re-election or re-appointment to 3-year terms

### 2022:

Trustees who in 2019 were elected or appointed to 3-year terms may request re-election or re-appointment to 3-year terms

The Court's Implementation Order should provide that term limits specified in Rule 32(e)(2)(F) for elected members, and in Rule 32(e)(3)(A) for public members, become effective on the implementation date and do not include a member's board service before that date. The Order should further provide that a member elected or appointed to a one- or two-year term during the phase-in period remains eligible to serve the number of full terms provided by those rules.

## IMPLEMENTATION OF OPTION Y

### 2019:

| District     | District area  | # of board members |
|--------------|--|--------------------|
| Division 1   | Elect 1 trustee to a 1-year term   | 1                  |
| Division 2   | Elect 1 trustee to a 2-year term   | 1                  |
| Maricopa     | Elect 1 trustee to a 1-year term, 1 trustee to a 2-year terms, and 1 trustee to a 3-year term  | 3                  |
| Pima         | Elect 1 trustee to a 3-year term   | 1                  |
| ASC public   | Appoint 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms | 6                  |
| ASC at-large | Appoint 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms | 6                  |
| YLS pres.    | Discontinued   | 0                  |
| LSD          | Discontinued   | 0                  |
| IPP          | "Advisor" (non-voting - not a trustee)   | 0                  |
| AJ           | "Liaison" (non-voting - not a trustee)   | 0                  |

**2019 total board size is 6 elected + 12 appointed = 18 trustees**

### 2020:

Trustees who in 2019 were elected or appointed to 1-year terms may request re-election or re-appointment to 3-year terms

### 2021:

Trustees who in 2019 were elected or appointed to 2-year terms may request re-election or re-appointment to 3-year terms

### 2022:

Trustees who in 2019 were elected or appointed to 3-year terms may request re-election or re-appointment to 3-year terms

The Court's Implementation Order should provide that term limits specified in Rule 32(e)(2)(F) for elected members, and in Rule 32(e)(3)(A) for public members, become effective on the implementation date and do not include a member's board service before that date. The Order should further provide that a member elected or appointed to a one- or two-year term during the phase-in period remains eligible to serve the number of full terms provided by those rules.

## IMPLEMENTATION OF OPTION Z

### 2019:

| District     | District area   | # of board members |
|--------------|---|--------------------|
| West         | Elect 1 trustee to a 1-year term (Yavapai, La Paz, Yuma)  | 1                  |
| North        | Elect 1 trustee to a 2-year term (Mohave, Navajo, Coconino, Apache)                             | 1                  |
| Southeast    | Elect 1 trustee to a 3-year term (Gila, Graham, Greenlee, Cochise, Santa Cruz, Pinal)           | 1                  |
| Maricopa     | Elect 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms    | 6                  |
| Pima         | Elect 1 trustee to a 1-year term and 1 trustee to a 2-year term                                 | 2                  |
| ASC public   | Appoint 1 trustees to a 1-year term, 1 trustee to a 2-year term, and 2 trustees to 3-year terms | 4                  |
| ASC at-large | Appoint 1 trustee to a 1-year term, 1 trustee to a 2-year term, and 1 trustee to a 3-year term  | 3                  |
| YLS pres.    | Discontinued  | 0                  |
| LSD          | Discontinued  | 0                  |
| IPP          | "Advisor" (non-voting - not a trustee)  | 0                  |
| AJ           | "Liaison" (non-voting - not a trustee)  | 0                  |

**2019 total board size is 11 elected + 7 appointed = 18 trustees**

### 2020:

Trustees who in 2019 were elected or appointed to 1-year terms may request re-election or re-appointment to 3-year terms

### 2021:

Trustees who in 2019 were elected or appointed to 2-year terms may request re-election or re-appointment to 3-year terms

### 2022:

Trustees who in 2019 were elected or appointed to 3-year terms may request re-election or re-appointment to 3-year terms

The Court's Implementation Order should provide that term limits specified in Rule 32(e)(2)(F) for elected members, and in Rule 32(e)(3)(A) for public members, become effective on the implementation date and do not include a member's board service before that date. The Order should further provide that a member elected or appointed to a one- or two-year term during the phase-in period remains eligible to serve the number of full terms provided by those rules.

**Appendix H: Supreme Court Rule 32 – comparison version**

| Current Rule 32   | Proposed Rule 32 (clean version)   |
|---|--|
| <p><b>Rule 32. Organization of State Bar of Arizona</b></p> <p><b>(a) Organization</b></p> <p>1. <i>Establishment of state bar.</i> In order to advance the administration of justice according to law, to aid the courts in carrying on the administration of justice; to provide for the regulation and discipline of persons engaged in the practice of law; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service, and high standards of conduct; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform; to carry on a continuing program of legal research in technical fields of substantive law, practice and procedure, and to make reports and recommendations thereon; to encourage practices that will advance and improve the honor and dignity of the legal profession; and to the end that the responsibility of the legal profession and the individual members thereof may be more effectively and efficiently discharged in the public interest, and acting within the powers vested in it by the constitution of this state and its inherent power over members of the legal profession as officers of the court, the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this court an organization known as the State Bar of Arizona, such organization which may be</p> | <p><b>Rule 32. Organization of the State Bar of Arizona</b></p> <p><b>(a) State Bar of Arizona.</b> The Supreme Court of Arizona maintains under its direction and control a corporate organization known as the State Bar of Arizona.</p> <p><b>(1) Practice of law.</b> Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules.</p> <p><b>(2) Mission.</b> The primary mission of the State Bar of Arizona is to protect and serve the public. This mission includes responsibilities to improve the legal profession and to advance the rule of law and the administration of justice. To accomplish its mission, this Court empowers the State Bar of Arizona, under the Court’s supervision, the authority to</p> <p style="padding-left: 40px;">(A) Organize and promote activities that best fulfill the responsibilities of the legal profession and its individual members to the public;</p> <p style="padding-left: 40px;">(B) Promote access to justice for those who live, work, and do business in this state;</p> |

a non-profit corporation under Chapter 5 of Title 10 of the Arizona Revised Statutes, and all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this court. The State Bar of Arizona may sue and be sued, may enter into contracts and acquire, hold, encumber, dispose of and deal in and with real and personal property, and promote and further the aims as set forth herein and hereinafter in these rules.

2. *Precedence of rules.* The qualifications of attorneys at law for admission to practice before the courts of this state, the duties, obligations and certain of the grounds for discipline of members, and the method of establishing such grounds, subject to the right of this court to discipline a member when it is satisfied that such member is not mentally or morally qualified to practice law even though none of the specific grounds for discipline set forth in these rules exist, shall be as prescribed in these rules pertaining to admission and discipline of attorneys.

**(b) Definitions.** Unless the context otherwise requires, the following definitions shall apply to the interpretation of these rules relating to admission, discipline, disability and reinstatement of lawyers:

1. "Board" means Board of Governors of the State Bar of Arizona.

2. "Court" means Supreme Court of Arizona.

(C) Aid the courts in the administration of justice;

(D) Assist this Court with the regulation and discipline of persons engaged in the practice of law; foster on the part of those engaged in the practice of law ideals of integrity, learning, competence, public service, and high standards of conduct; serve the professional needs of its members; and encourage practices that best uphold the honor and dignity of the legal profession;

(E) Conduct educational programs regarding substantive law, best practices, procedure, and ethics; provide forums for the discussion of subjects pertaining to the administration of justice, the practice of law, and the science of jurisprudence; and report its recommendations to this Court concerning these subjects.

**(b) Definitions.** Unless the context otherwise requires, the following definitions shall apply to the interpretation of these rules relating to admission, discipline, disability and reinstatement of lawyers:

**(1)** "Board" means Board of Trustees of the State Bar of Arizona, formerly known as the Board of Governors of the State Bar of Arizona.



judicial. Disbarred or resigned persons are not members of the bar.

2. *Active Members.* Every person licensed to practice law in this state is an active member except for persons who are inactive, retired, suspended, or judicial members.

3. *Admission and Fees.* All persons admitted to practice in accordance with the rules of this court shall, by that fact, become active members of the state bar. Upon admission to the state bar, the applicant shall pay a fee as required by the supreme court, which shall include the annual membership fee for active members of the state bar. If an applicant is admitted to the state bar on or after July 1 in any year, the annual membership fee payable upon admission shall be reduced by one half. Upon admission to the state bar, an applicant shall also, in open court, take and subscribe an oath to support the constitution of the United States and the constitution and laws of the State of Arizona in the form provided by the supreme court. All members shall provide to the state bar office a current street address, e-mail address, telephone number, any other post office address the member may use, and the name of the bar of any other jurisdiction to which the member may be admitted. Any change in this information shall be reported to the state bar within thirty days of its effective date. The state bar office shall forward to the court, on a quarterly basis, a current list of membership of the bar.

4. *Inactive Members.* Inactive members shall be those who have, as provided in these rules, been transferred to inactive

“Board of Governors” in section (c)(7) to “Board of Trustees”

status. An active member who is not engaged in practice in Arizona may be transferred to inactive status upon written request to the executive director. Inactive members shall not practice law in Arizona, or hold office in the State Bar or vote in State Bar elections. On application and payment of the membership fee and any delinquent fees that may be due under Rule 45(d), they may become active members. Inactive members shall have such other privileges, not inconsistent with these rules, as the Board may provide. Incapacitated members may be transferred to disability inactive status and returned to active status as provided in these rules.

5. *Retired Members.* Retired members shall be those who have, as provided in these rules, been transferred to retired status. An active, inactive or judicial member who is not engaged in active practice in any state, district, or territory of the United States may be transferred to retired status upon written request to the executive director. Retired members shall not hold State Bar office or vote in State Bar elections. Retired members shall not practice law in any state, district, or territory of the United States. Retired members may provide volunteer legal services to approved legal services organizations as defined in Rule 38(e) of these rules, except that retired members need not have engaged in the active practice of law within the last five years as required in Rule 38(e)(2)(B)(1) or Rule 38(e)(3) (A). Retired members may return to active status subject to the requirements imposed on inactive members who return to active status, as set forth in subsection (c)(4) of this rule. Retired members shall



have other privileges, not inconsistent with these rules, as the Board may provide. Incapacitated members may be transferred to disability inactive status and return to active status as provided in these rules.

6. *Judicial Members.* Judicial members shall be justices of the Supreme Court of Arizona, judges of the Court of Appeals and Superior Court of Arizona and of the United States District Court for the District of Arizona. Judicial membership status shall likewise be accorded to members of the state bar who are full-time commissioners, city or municipal court judges, judges pro tempore or justices of the peace in the state of Arizona not engaged in the practice of law, or justices or judges of other courts of record of the United States or of the several states. Judicial members shall hold such classification only so long as they hold the offices or occupations entitling them to such membership. Judicial members shall be entitled to vote but shall not be entitled to hold office. Judicial members shall have such privileges, not inconsistent with the rules of this court, as the board provides. A judicial member who retires or resigns from the bench shall become an active member subject to all provisions of these rules.

7. *Membership Fees.* An annual membership fee for active members, inactive members, retired members and judicial members shall be established by the board with the consent of this court and shall be payable on or before February 1 of each year. No annual fee shall be established for, or assessed to, active members who have been admitted to

practice in Arizona before January 1, 2009, and have attained the age of 70 before that date. The annual fee shall be waived for members on disability inactive status pursuant to Rule 63. Upon application, the Board of Governors may waive the dues of any other member for reasons of personal hardship.

8. *Computation of fee.* The annual membership fee shall be composed of an amount for the operation of the activities of the state bar and an amount for funding the Client Protection Fund, each of which amounts shall be stated and accounted for separately. Each active and inactive member, who is not exempt, shall pay the annual Fund assessment set by the court, to the state bar together with the annual membership fee, and the state bar shall transfer the fund assessment to the trust established for the administration of the Client Protection Fund.

9. *Allocation of fee.* Upon payment of the membership fee, each member shall receive a bar card issued by the board evidencing payment. All fees shall be paid into the treasury of the state bar and, when so paid, shall become part of its funds, except that portion of the fees representing the amount for the funding of the Client Protection Fund shall be paid into the trust established for the administration of the Client Protection Fund.

10. *Delinquent Fees.* A fee not paid by the time it becomes due shall be deemed delinquent. An annual delinquency fee for active members, inactive members, retired members and judicial members shall be established by the board with the consent of this court and shall be paid in addition

to the annual membership fee if such fee is not paid on or before February 1. A member who fails to pay a fee within two months after written notice of delinquency shall be summarily suspended by the board from membership to the state bar, upon motion of the state bar pursuant to Rule 62, but may be reinstated in accordance with these rules.

11. *Resignation.*

A. Members in good standing who wish to resign from membership in the state bar may do so, and such resignation shall become effective when filed in the office of the state bar, accepted by the board, and approved by this court. After the resignation is approved by this court, such person's status shall be changed to "resigned in good standing."

B. Such resignation shall not be a bar to institution of subsequent discipline proceedings for any conduct of the resigned person occurring prior to the resignation. In the event such resigned person thereafter is disbarred, suspended or reprimanded, the resigned person's status shall be changed from "resigned in good standing" to that of a person so disciplined. Such resignation shall not be accepted if there is a disciplinary charge or complaint pending against the member.

C. Resigned persons in good standing may be reinstated to membership in the same manner as members summarily suspended under Rule 62 of these rules. Reinstatement of resigned persons shall be governed by the procedures set forth in Rule 64(f) and shall require:

i. payment of fees, assessments, and administrative costs the resigned person would have been required to pay;

ii. proof of completion of any hours of continuing legal education activity the resigned person would have been required to take, had the applicant remained a member; and

iii. proof that the resigned person possesses the character and fitness to resume practicing law in this jurisdiction.

D. A member wishing to resign shall apply on a form approved by the board and shall furnish such information as is required upon such form and shall make such allegations, under oath, as are required on such form.

*12. Insurance Disclosure.*

A. Each active member of the State Bar of Arizona shall certify to the State Bar on the annual dues statement or in such other form as may be prescribed by the State Bar on or before February 1 of each year: (1) whether the lawyer is engaged in the private practice of law; and (2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance. Each active member who reports being covered by professional liability insurance shall notify the State Bar of Arizona in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason. A lawyer who acquires insurance after filing the annual dues statement or such other prescribed disclosure document with the State Bar of Arizona may advise the Bar as to the change of this status in coverage.

B. The State Bar of Arizona shall make the information submitted by active members pursuant to this rule available to the public on its website as soon as practicable after receiving the information.

C. Any active member of the State Bar of Arizona who fails to comply with this rule in a timely fashion may, on motion of the State Bar pursuant to Rule 62, be summarily suspended from the practice of law until such time as the lawyer complies. Supplying false information in complying with the requirements of this rule shall subject the lawyer to appropriate disciplinary action.

**(d) Powers of Board.** The state bar shall be governed by the Board of Governors, which shall have the powers and duties prescribed by this court. The board shall:

1. Fix and collect, as provided in these rules, fees approved by the supreme court, which shall be paid into the treasury of the state bar.

2. Promote and aid in the advancement of the science of jurisprudence and improvement of the administration of justice.

3. Make appropriations and disbursements from funds of the state bar to pay necessary expenses for carrying out its functions.

4. Formulate and declare rules and regulations not inconsistent with these rules, necessary or expedient to enforce these rules and by rule fix the time and place of annual meetings of the state bar and the manner of calling special meetings thereof, and determine what number shall constitute a quorum of the state bar.

5. Appoint such committees, officers and employees it deems necessary or proper and prescribe their duties. Compensation

**(d) Powers of Board.** The State Bar shall be governed by a Board of Trustees, which shall have the powers and duties prescribed by this Court. The board shall:

**(1)** Fix and collect, as provided in these rules, fees approved by the Supreme Court, which shall be paid into the treasury of the State Bar.

**(2)** Promote and aid in the advancement of the science of jurisprudence, the education of lawyers, and the improvement of the administration of justice.

**(3)** Approve budgets and make appropriations and disbursements from funds of the State Bar to pay necessary expenses for carrying out its functions.

**(4)** Formulate and declare rules and regulations not inconsistent with Supreme Court Rules that are necessary or expedient to enforce these rules, and by rule fix the time and place of State Bar meetings and the manner of calling special meetings, and determine what number shall constitute a quorum of the State Bar.

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| <p>of employees shall be as determined by the board.</p> <p>6. Appoint from time to time one or more executive committees composed of members of the board and vest in the executive committees any powers and duties granted to the board as the board may determine.</p> <p>7. Prepare an annual statement showing receipts and expenditures of the state bar for the twelve preceding months. The statement shall be promptly certified by the treasurer and a certified public accountant, and transmitted to the chief justice of this court.</p> <p>8. Create and maintain the Client Protection Fund, as required by this court and authorized by the membership of the state bar April 9, 1960, said fund to exist and be maintained as a separate entity from the state bar in the form of the Declaration of Trust established January 7, 1961, as subsequently amended and as it may be further amended from time to time by the board. The trust shall be governed by a Board of Trustees appointed by the Board of Governors in accordance with the terms of the trust and the trustees shall govern and administer the Fund pursuant to the provisions of the trust as amended from time to time by the board and in accordance with such other procedural rules as may be approved by the Board of Governors.</p> <p>9. Have the power to form a non-profit corporation under Chapter 5 of Title 10 of the Arizona Revised Statutes upon a majority vote of the Board of Governors.</p> | <p>(5) Appoint a Chief Executive Office/Executive Director to manage the State Bar's day-to-day operations.</p> <p>(6) Appoint from time to time one or more executive committees composed of members of the board and vest in the executive committees any powers and duties granted to the board as the board may determine.</p> <p>(7) Prepare an annual statement showing receipts and expenditures of the State Bar for the twelve preceding months. The statement shall be promptly certified by the secretary-treasurer and a certified public accountant, and transmitted to the Chief Justice of this Court.</p> <p>(8) Create and maintain the Client Protection Fund, as required by this Court and authorized by the membership of the State Bar on April 9, 1960, said fund to exist and be maintained as a separate entity from the State Bar in the form of the Declaration of Trust established January 7, 1961, as subsequently amended and as it may be further amended from time to time by the board. The trust shall be governed by a separate board of trustees appointed by the State Bar Board of Trustees in accordance with the terms of the trust. The trustees of the Client Protection Fund shall govern and administer the Fund pursuant to the provisions of the trust, and in accordance with other procedural rules as may be</p> |
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10. Implement and administer mandatory continuing legal education in accordance with Rule 45.

**(e) Composition of Board.**

1. For the purposes of these rules the state is divided into eight bar districts, numbered one through eight as follows:

A. Mohave, Navajo, Coconino and Apache counties shall be district 1.

B. Yavapai county shall be district 2.

C. Gila, Graham and Greenlee counties shall be district 3.

D. Cochise county shall be district 4.

E. Pima and Santa Cruz counties shall be district 5.

F. Maricopa county shall be district 6.

G. La Paz and Yuma counties shall be district 7.

H. Pinal county shall be district 8.

2. There shall be a Board of Governors of the state bar which shall consist of twenty-six (26) members, all authorized to vote. Four (4) members of the Board of Governors shall be designated as “public

approved by the State Bar Board of Trustees.

**(9)** Implement and administer mandatory continuing legal education in accordance with Rule 45.

**(10)** Administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 40.

➤ **Immediately below is SECTION (e), OPTION X (see subsequent pages for Option Y and Option Z). Underlining in Section (e) highlights differences in the three options.**

**(e) Composition of the Board.** The governing board of the State Bar of Arizona is a board of trustees. The board is composed of six elected trustees and nine appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

member." The public members shall not be members of the state bar, and shall not have, other than as consumers, a financial interest in the practice of law. Public members shall be appointed by the Board of Governors for terms of three (3) years. No more than two (2) public members may be from the same district. Public members may be reappointed for one additional term of three (3) years. No individual may serve more than six (6) years as a public member of the Board of Governors. There shall be three (3) at-large members on the Board of Governors appointed by the Supreme Court for terms of three (3) years. Nineteen (19) members of the Board of Governors shall be active members in good standing of the state bar designated as "elected members" and elected as follows:

- A. From Bar District 1, one member.
- B. From Bar District 2, one member.
- C. From Bar District 3, one member.
- D. From Bar District 4, one member.
- E. From Bar District 5, three members.
- F. From Bar District 6, nine members.
- G. From Bar District 7, one member.
- H. From Bar District 8, one member.
- I. From the Young Lawyers Section of the state bar, its President.

3. Beginning with the 2004 annual meeting, and every three (3) years thereafter, the Governors shall be elected from Bar Districts 1, 3, 4, 5 and 7 for terms of three (3) years. Beginning with the 2005 annual meeting and every three (3) years thereafter, the Governors shall be elected from Bar Districts 2, 6 and 8 for terms of three (3) years. Nominations for Governors shall be by petition signed by at least five (5) active members, and each candidate named in a petition and all members signing such petition shall have

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** Each elected trustee must be an active member of the State Bar of Arizona throughout the elected term. Each elected trustee must have been an active State Bar member, and have had no record of formal discipline, for five years prior to election to the board.

**(C) Nominations.** Nominations for elected trustees shall be by petition signed by at least five active State Bar members. Each candidate named in a petition and all members signing a petition must have their main offices in the district in which the candidate seeks to be elected.

**(D) Elections.** Election of trustees must be by ballot. Active and judicial members are entitled to vote for the elected trustee or trustees in the district in which a member has his or her principal place of business, as shown in the records of the State Bar. Active out-of-state members may vote in the district of their most recent Arizona residence or place of business or, if



their principal place of business in the district the candidate is nominated to represent. Only members who have been admitted to practice before the Arizona Supreme Court for not less than five (5) years are eligible to be elected members of the Board of Governors. The election shall be by ballot. The ballots shall be mailed to those entitled to vote at least thirty (30) days prior to the date of canvassing the ballots, shall be returned by mail or through electronic voting means and shall be canvassed at the ensuing annual meeting. In other respects the election shall be as the Board of Governors by rule directs. Only active and judicial members shall be entitled to vote for the Governor or Governors of the Bar District in which such active and judicial members respectively have their principal place of business.

4. The President of the Young Lawyers Section shall be elected by a mail ballot to all members of the Section, such ballot announcing to all members of the Section that the President of the Young Lawyers Section will hold a voting position on the Board of Governors. The election of the President of the Young Lawyers Section shall be on a yearly basis and shall be completed within ninety days of the annual meeting.

5. Elected members of the board of governors shall hold office until their successors are elected and qualified. Should a member of the Board move his or her principal place of business from the district he or she represents, his or her seat shall be declared vacant. A vacancy among the elected members of the Board of Governors shall be filled by the remaining members of the Board. A vacancy in a public member position shall

none, in the Maricopa County District. The State Bar must send ballots electronically to each member entitled to vote, at the address shown in the records of the State Bar, at least two weeks prior to the date of canvassing the ballots. Members must return their ballots through electronic voting means, and the State Bar will announce the results at the ensuing annual meeting. The State Bar's by-laws will direct other details of the election process.

**(E) Terms of service.** Elected trustees serve a three-year term. An elected trustee serves on the board until a successor is elected and takes office at the annual meeting. If the board receives notice that an elected trustee's principal place of business has moved from the district in which the trustee was elected, or that the trustee has died, become disabled, or is otherwise unable to serve, that trustee's seat is deemed vacant, and the other elected and appointed trustees will choose a successor by a majority vote.

**(F) Term limits.** An elected trustee may serve three consecutive terms, but may not be a candidate for a fourth term until three years have passed after the person's last year of service. Election or appointment to a partial term of less than three years will not be included in a calculation of a member's term limit.

be filled by the Board of Governors. A vacancy in an at-large member position shall be filled by the Supreme Court.

**(3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.

**(A) Public trustees.** Three trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. The Court may reappoint a public trustee for one additional term of three years. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member’s term limit.

**(B) At-large trustees.** Six trustees on the board are designated as “at-large” trustees. At-large trustees, who may be former

elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

**(4) Oath of trustees.** Upon commencing service, each trustee, whether elected or appointed, must take an oath to faithfully and impartially discharge the duties of a trustee.

**(5) Removal of a trustee.** A trustee of the board may be removed for good cause by a vote of two-thirds or more of the trustees cast in favor of removal. Good cause for removal exists if a trustee undermines board meetings, or compromises the integrity of the board. Expression of unpopular views does not constitute good cause. Good cause also may include, but is not limited to, conviction of a felony or a crime involving moral turpitude, imposition of a formal discipline sanction, repeatedly ignoring the duties of a trustee, or disorderly activity during a board meeting. A board trustee so removed may, within thirty days of the board's action, file a petition pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure requesting that the Supreme Court review the board's determination

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| <p><b>(f) Officers of the State Bar.</b></p> <p>1. The officers of the state bar shall be a president, a president-elect, two vice-presidents, and a secretary/treasurer.</p> <p>2. The term for the office of president shall expire at the conclusion of the annual meeting, and the president-elect whose term expired at the same annual meeting shall automatically become the president and assume the duties of such office. The first vice-president, whose term expired at the same annual meeting, shall automatically become the president-elect and assume the duties of such office.</p> <p>3. The first and second vice-presidents and secretary/treasurer shall be elected from its membership by the board at the annual meetings. Such newly elected officers shall assume the duties of their respective offices at the conclusion of the annual meeting at which they are elected.</p> | <p>of good cause. The Supreme Court will expedite consideration of the petition.</p> <p><b>(6) Recusal of an attorney trustee.</b> An attorney board member who is the subject of a formal disciplinary complaint must recuse him- or herself from serving on the board pending disposition of the complaint.</p> <p><b>(f) Officers of the State Bar.</b></p> <p><b>(1) Officers.</b> The board will elect its officers. The officers are a president, a president-elect, and a secretary-treasurer. An elected or appointed trustee may serve as an officer.</p> <p><b>(2) Terms of office.</b></p> <p><b>(A) President.</b> The term of the president will expire at the conclusion of the annual meeting. The president-elect whose term expired at the same annual meeting will then automatically become, and assume the duties of, president at that time.</p> <p><b>(B) President-elect and secretary-treasurer.</b> The board must elect a new president-elect and a new secretary-treasurer at each</p> |
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| <p>4. The officers of the state bar shall continue in office until their successors are elected and qualified.</p> <p>5. An officer may be removed from his office by the vote of two-thirds or more of the members of the board of governors cast in favor of his removal at a meeting called for such purpose.</p> <p>6. A vacancy in any office caused other than by expiration of a term may be filled by the board of governors at a meeting called for such purpose.</p> <p>7. The president shall preside at all meetings of the state bar and the board, and if absent or unable to act, the president-elect or one of the vice-presidents shall preside. Additional duties of the president, president-elect, vice-presidents and the secretary/treasurer may be prescribed by the board.</p> <p>8. No public member shall hold office.</p> | <p>annual meeting. Those newly elected officers will assume their respective offices at the conclusion of the annual meeting at which they are elected, and they will continue to hold their offices until the conclusion of the subsequent annual meeting at which their successors are elected.</p> <p><b>(C) Length of term.</b> Each officer will serve a one-year term.</p> <p><b>(D) Successive terms.</b> A trustee may not be elected to a second term for any office that the trustee has held during the preceding nine or fewer consecutive years of service on the board.</p> <p><b>(E) Limitations.</b> The term of an trustee chosen as president or president-elect automatically extends until completion of a term as president if his or her term as a trustee expires in the interim without their reelection or reappointment to the board, or if the term is limited under Rule 32(e)(2)(F). In either of these events, there shall not be an election or appointment of a new trustee for the seat held by the president or president-elect until the person has completed his or her term as president, and then the election or</p> |
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appointment of a successor trustee shall be for a partial term that otherwise remains in the regular three-year cycle under Rule 32(e)(1).

**(3) Duties of officers.** The president will preside at all meetings of the State Bar and of the board of trustees, and if absent or unable to act, the president-elect will preside. Additional duties of the president, president-elect, and secretary-treasurer may be prescribed by the board or set forth in the State Bar by-laws.

**(4) Board advisor.** The immediate past president of the board will serve a one-year term as an advisor to the board. The advisor may participate in board discussions but has no vote at board meetings. The board advisor, with the assistance of two or more trustees chosen by the president, will lead a committee to recruit, recommend, and nominate candidates for the offices of president-elect and secretary-treasurer.

**(5) Removal from office.** An officer may be removed from office, with or without good cause, by a vote of two-thirds or more of the members of the board of trustees cast in favor of removal.

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| <p><b>(g) Annual meeting.</b> Annual meetings of the state bar shall be held at times and places designated by the board. At the annual meeting reports of the proceedings of the board since the last annual meeting, reports of other officers and committees and recommendations of the board shall be received. Matters of interest pertaining to the state bar and the administration of justice may be considered and acted upon. Special meetings of the state bar may be held at such times and places as provided by the board.</p> <p><b>(h) Administration of rules.</b> Examination and admission of members shall be administered by the committee on examinations and the committee on character and fitness, as provided in these rules. Discipline, disability, and reinstatement matters shall be administered by the disciplinary commission, as provided in these rules. All matters not otherwise specifically provided for shall be administered by the board.</p> <p><b>(i) Filings made.</b> Papers required to be filed with the state bar under these rules shall be filed at the office of the state bar in Phoenix, except as is otherwise set forth in these rules.</p> | <p><b>(6) Vacancy in office.</b> A vacancy in any office before expiration of a term may be filled by the board of trustees at a meeting called for that purpose.</p> <p><b>(g) Annual meeting [No change]</b></p> <p><b>(h) Administration of rules [No change]</b></p> <p><b>(i) Filings made [No change]</b></p> |
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| <p><b>(j) Formal Requirements of Filings.</b> All verbatim records and all copies of recommendations, documents, papers, pleadings, reports and records required or permitted by any provision of these rules relating to admission, discipline, disability, and reinstatement may be either typewritten, electronically prepared, or copied by a process that is clear, legible, or audible. An original is not required.</p>  | <p><b>(j) Formal Requirements of Filings [No change]</b></p>             |
| <p><b>(k) Payment of Fees and Costs.</b> The payment of all fees, costs, and expenses required under the provisions of these rules relating to membership, mandatory continuing legal education, discipline, disability, and reinstatement shall be made to the treasurer of the state bar. The payment of all fees, costs and expenses required under the provisions of these rules relating to application for admission to the practice of law, examinations and admission shall be made to the finance office of the administrative office of the courts.</p>   | <p><b>(k) Payment of Fees and Costs [No change]</b></p>                  |
| <p><b>(l) Expenses of Administration and Enforcement.</b> The state bar shall pay all expenses incident to the administration and enforcement of these rules relating to membership, mandatory continuing legal education, discipline, disability, and reinstatement of lawyers, except that costs and expenses shall be taxed against a respondent lawyer or applicant for readmission, as provided in these rules. The administrative office of the courts shall pay all expenses incident to administration and enforcement of these rules relating to application for admission to the practice of law, examinations and admission.</p> | <p><b>(l) Expenses of Administration and Enforcement [No change]</b></p> |



➤ **SECTION (e)(1-3), OPTION Y:**

**(e) Composition of the Board.** The State Bar of Arizona is governed by a board of trustees. The board is composed of six elected trustees and twelve appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** [No change from Option X]

**(C) Nominations.** [No change from Option X]

**(D) Elections.** [No change from Option X]

**(E) Terms of service.** [No change from Option X]

**(F) Term limits.** [No change from Option X]

**(3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.

**(A) Public trustees.** Six trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included

in a calculation of the member's term limit.

**(B) At-large trustees.** Six trustees on the board are designated as "at-large" trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

➤ **SECTION (e)(1-3), OPTION Z:**

**(e) Composition of the Board of Trustees.** The State Bar of Arizona is governed by a board of trustees. The board is composed of eleven elected trustees and seven appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from five districts, as follows:

- i. Maricopa County District: six trustees;

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|  | <ul style="list-style-type: none"> <li>ii. West District (Yavapai, Yuma, and La Paz Counties): one trustee;</li> <li>iii. North District (Mohave, Coconino, Navajo, and Apache Counties): one trustee;</li> <li>iv. Pima County District: two trustees; and</li> <li>v. Southeast District: Pinal, Gila, Graham, Santa Cruz, Cochise, and Greenlee Counties): one trustee.</li> </ul> <p><b>(B) Qualifications.</b> [No change from Option X]</p> <p><b>(C) Nominations.</b> [No change from Option X]</p> <p><b>(D) Elections.</b> [No change from Option X]</p> <p><b>(E) Terms of service.</b> [No change from Option X]</p> <p><b>(F) Term limits.</b> [No change from Option X]</p> <p><b>(3) Appointed trustees.</b> The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.</p> <p><b>(A) Public trustees.</b> Four trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the</p> |
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practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member's term limit.

**(B) At-large trustees.** Three trustees on the board are designated as "at-large" trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

## Appendix I: Proposed Rule 40 regarding the Board of Legal Specialization

### **Rule 40. Legal Specialization**

- a. **Purpose.** A legal specialization program will identify to the public and members of the bar those attorneys who have demonstrated a high degree of competence in a specific field of law. Identifying attorneys in this fashion will increase the quality of legal services and will allow members of the public to more closely match their needs with attorneys who have specialized in a field of law.
- b. **Board.** The State Bar of Arizona will administer an attorney specialization program through a Board of Legal Specialization (“BLS”).
- c. **Board members.** The Board of Legal Specialization will consist of thirteen members, as follows: eight practicing attorneys, four of whom are not specialists and four of whom are certified specialists; one representative from an accredited law school in Arizona; and four members of the public. Members of the BLS and a BLS chair will be nominated by Board of Trustees and appointed by the Supreme Court. BLS Board members will serve four-year terms, with a limit of two terms. The BLS Board chair will serve a two-year term and may be appointed to a second term.
- d. **Board rules.** The Board of Trustees must establish rules of procedure, assuring due process to all applicants, for the Board of Legal Specialization. Those rules may designate, among other things, practice areas of specialization and objective qualifications for specialization in a particular practice area. Those rules, and any amendments to those rules, must be submitted to and approved by the Supreme Court.
- e. **Limitations.** No BLS Board rule may limit the right of a specialist to practice in other fields of law or limit the right of a specialist to associate with attorneys who are not specialists. Further, no rule may require an attorney to be a specialist before practicing in any particular field.
- f. **Review.** The rules of the BLS must provide a procedure for review of an adverse decision for any attorney who is aggrieved by a Board decision. The rules may provide that the review procedure begins within the State Bar of Arizona, but when the State Bar’s review process becomes final, the rules must provide an aggrieved attorney a right to seek judicial review pursuant to the Arizona Rules of Procedure for Special Actions.



June 11, 2015

Task Force on the Review of the Role and  
Governance Structure of the State Bar of Arizona  
Hon. Rebecca White Berch, Chair

*via email*

**Re: Draft Report of the Task Force**

Dear Justice Berch and fellow Task Force members,

The Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona was formed to report recommendations to the Arizona Supreme Court for changes to the State Bar of Arizona's mission(s) and governance. Ariz. Sup. Ct. Admin. Order No. 2014-79. The Task Force has now begun to formalize its recommendations for reforms in advance of the September 1, 2015 due date for its report. As a member of this Task Force, I write to elucidate my views on the Task Force's draft report and to explain how and why my views differ as to the majority recommendations thus far advanced by this Task Force.

**Summary**

The reforms recommended by the majority of the Task Force are superficial; they do nothing to change the status quo of the Arizona State Bar, which is in need of reform. The majority's recommended reforms are:

1. Stylistic changes to Rule 32 to clarify that the primary mission of the State Bar of Arizona is to protect and serve the public;
2. Maintaining the integrated bar association and all its powers;
3. Reducing the size of the governing board of the State Bar and tweaking the manner in which the board is populated;
4. Adding certain qualifications, term limits and removal procedures for board members;
5. Changing the officer track of the board;

6. Changing the board's name and imposing an oath on members to "emphasize the fiduciary role of the board."

While these reforms are (mostly) fine as far as they go, they do not go nearly far enough.

These proposed reforms are insufficient because the Task Force majority has recommended keeping in place the integrated—or mandatory—State Bar and its governing board which consists mostly of lawyers. But integrated bar associations controlled by lawyers are dangerous. Such associations have an inherent conflict of interest because they are both a regulator of and "trade association" for lawyers. This conflict is exacerbated when lawyers elect a controlling number of other lawyers to represent them in their own regulatory board. This system inherently threatens capture of the regulatory board by lawyers at the expense of the public, as the U.S. Supreme Court has just recently warned. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015). Integrated bars also threaten the First Amendment rights of attorney members. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). Given that many states regulate lawyers to protect the public without an integrated bar, and in light of the inherent threats attendant to integrated bar associations controlled by lawyers, the continuation of the State Bar of Arizona as an integrated bar cannot be justified.

The continuation of the State Bar in its current form—an integrated bar under the governance of a lawyer-elected board—is particularly unwarranted because the current form of the "integrated" bar does nothing to protect the public. This is because the part of the State Bar that is controlled by the Board of Governors has—as a result of the Arizona Supreme Court having taken them away—very few, if any, public-protection regulatory responsibilities. The core public-protection functions one normally associates with a state bar are instead in the hands of independent committees and boards created by the Arizona Supreme Court and professional staff that, while part of the State Bar, are not actually under the control of the Board of Governors. This leaves the Board of Governors and the portion of the State Bar remaining under its control to serve only as a mandatory "trade association" for lawyers—a de facto public agency that advocates for protectionism and other positions while forcing lawyers to be a part of that expressive association. This "halfway" arrangement—in which the Board-controlled portion of the State Bar has few of the regulatory powers normally associated with an integrated bar, but is not yet a non-integrated bar—is preferable to an integrated bar in which a lawyer-controlled board has a full portfolio of regulatory powers. But as explained below, the State Bar in its current form still threatens the public interest, as well as the First Amendment rights of "members" of the State Bar.

Given these threats and the reality of the current status of the Board of Governors and the State Bar, the Arizona Supreme Court should adopt the following reforms rather than the Task Force's tepid recommendations:

1. Abolish the "integrated" State Bar in order to formally separate the regulatory and trade association functions the Supreme Court has already tried to separate in practice, rid the trade association of its veneer of state sanction and support, and protect lawyers' First Amendment rights.



2. Recognize the Arizona State Bar as a purely regulatory agency, tasked only with protecting the public, to oversee and implement the regulation of lawyers and the practice of law. Because the Court has already stripped the Board of Governors of any power over the professional staff at the State Bar responsible for these functions, this is not a substantive change so much as recognition of current practice.
3. Abolish the Board of Governors (or “Board of Trustees” as the Task Force has recommended it be called) of the State Bar and instead rely only on professional staff to assist the Court in the regulation of the practice of law and of lawyers. Again, this is not a substantive change so much as recognition of current practice.
4. If the Court believes that a governing board is necessary to assist it in the regulation of the practice of law and of lawyers (and whether or not the State Bar remains an integrated bar association), the Court should appoint—lawyers should not elect—a small board that better represents the public, not lawyers. Lawyers should not have the power to elect and control their own regulators. No other economic interest group in Arizona has this power, nor should they.

As explained more fully below, these more substantive reforms are necessary to address the many interrelated problems that define the Arizona State Bar, a mandatory-membership organization tasked by law to represent both lawyers and the public, two groups that have fundamentally different interests. Section I sets out the defined powers and governance of the integrated State Bar and criticizes the conflicts inherent in the State Bar’s missions and governance structure. Section II briefly recounts the State Bar’s history of protectionist actions aimed at furthering the interests of lawyers to the detriment of the public. Section III explains that abolishing the integrated bar controlled by lawyers will not adversely affect protection of the public because the Supreme Court has already largely taken the core public-protection functions normally associated with a state bar from the Board of Governors’ oversight and placed those functions in the hands of independent groups and professional staff. Section IV argues that, in light of the Supreme Court’s stripping of public-protection functions from the integrated State Bar, what is left of the integrated State Bar is not worth the cost. Section V explains how the mandatory association of the integrated bar threatens the First Amendment rights of “members” of the State Bar. Section VI argues that it is necessary to formally abolish and replace the integrated state bar with a regulatory-only state bar to best protect the public and indeed that this action simply finishes the job the Arizona Supreme Court has already started. Finally, Section VII criticizes the recommendations for weak reforms thus far advanced by the Task Force’s majority report.

## **I. Arizona’s Integrated State Bar, Its Powers, Governance, and Conflict of Interest**

“A man cannot serve two masters.” This ancient maxim is most familiar to lawyers in the context of conflicts of interest and our ethical rules. But the State Bar of Arizona is by design beholden to two masters: lawyers and the public. This section explains this conflict of interest in light of the State Bar’s power and its current governance structure. Section A takes on the scope of the State Bar’s regulatory powers under Arizona Supreme Court Rules. Section B discusses the State Bar as an “integrated” bar association, a body that combines regulatory

powers with “trade association” interests. Section C demonstrates how the governance of the State Bar is controlled by lawyers. Finally, Section D briefly criticizes integrated bar associations in light of public choice theory and the recent U.S. Supreme Court decision in *Dental Examiners*.

#### **A. The State Bar’s Regulatory Powers**

The State Bar is established by the Arizona Supreme Court and tasked with assisting in the regulation of the practice of law. Ariz. R. Sup. Ct. 32. The State Bar itself claims it “regulates approximately 18,000 active attorneys.” *About Us*, State Bar of Ariz., <http://www.azbar.org/AboutUs> (June 2, 2015) [<http://perma.cc/NZ5C-6N64>]. Among the regulatory powers the State Bar exercises, it:

- Prosecutes lawyer disciplinary and disability matters. *See* Ariz. R. Sup. Ct. 46-69.
- Prosecutes the unauthorized practice of law. Ariz. R. Sup. Ct. 31(a)(2)(B), 46(b), 75-79.
- Mandates compliance with “client trust account” requirements. Ariz. R. Sup. Ct. 43.
- Created and maintains the “Client Protection Fund.” Ariz. R. Sup. Ct. 32(d)(8).
- Implements and administers mandatory continuing legal education for attorneys. Ariz. R. Sup. Ct. 32(d)(10) & 45.
- Declares rules and regulations not inconsistent with the Supreme Court’s Rules. Ariz. R. Sup. Ct. 32(d)(4).
- Fixes and collects certain fees. Ariz. R. Sup. Ct. 32(d)(1).

Theoretically, these regulatory powers are meant to protect the public from lawyers. *See Lawyer Regulation*, State Bar of Ariz., <http://www.azbar.org/LawyerRegulation> (June 2, 2015) [<http://perma.cc/9H5G-AXEE>] (setting forth the purposes of lawyer discipline proceedings); *Client Protection Fund*, State Bar of Ariz., <http://www.azbar.org/legalhelpandeducation/clientprotectionfund> (June 2, 2015) [<http://perma.cc/9MBT-9P4C>] (setting forth the purpose of the Client Protection Fund). But protecting the public is not the State Bar’s only mission. The State Bar also serves as the “trade association” for Arizona lawyers because it is an “integrated” or “mandatory” bar association.

An integrated bar association creates an inherent conflict because lawyers, as an interest group, and the public often have different interests, as described in part B below. No organization should be both a regulator and a trade association. In Arizona, granted, our Supreme Court has already taken steps to alleviate this conflict by not granting certain powers to the State Bar and stripping many of the above-listed regulatory powers from the integrated bar, overseeing them directly through separate professional staff at the State Bar, as described in Section III. But this means that what is left of the State Bar under the oversight of the Board of

Governors serves primarily the trade association mission, which gives official sanction to an organization that is mostly concerned with the interests of lawyers, not the public interest.

## **B. The State Bar as Integrated Bar Association and Trade Association**

The Arizona State Bar is what is known as an “integrated” or “unified” bar association, a polite way of saying “mandatory.” An “integrated bar association” is one in which membership is mandated in order to practice law. Black’s Law Dictionary 177 (10th ed. 2014). This is the equivalent of requiring not just a license to practice law, *but also* requiring a license holder to be a member of an association. *See* Ariz. R. Sup. Ct. 32(a) (“[A]ll persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this court.”).

As has been described throughout this Task Force’s meetings, the integrated nature of the State Bar of Arizona means it has two purposes: One, as described above, it serves as a regulator of lawyers and the practice of law, and two, it also serves as a “trade association” for lawyers. *Cf.* May 8, 2015 Task Force Draft Report at 10 (“[T]he [State Bar] does not exist *solely* to serve the interest of its professional members.” (emphasis added)). Or, as the State Bar president-elect put it, “although the [State Bar’s] role is to safeguard the interests of the public, it is also the voice of Arizona’s attorneys.” Feb. 19, 2015 Task Force Meeting Minutes at 1, <http://www.azcourts.gov/Portals/74/GOV/2015/04232015/MeetingPktPOST.pdf>. In truth, given the Supreme Court’s stripping of regulatory powers from the State Bar and/or the Board of Governors’ oversight described in Section III, Arizona’s integrated bar serves mostly as the officially-sanctioned voice of Arizona’s attorneys, as described in Sections II and IV.<sup>1</sup>

It is not necessary to have a bar with both regulatory and trade-association powers. At last count, at least 18 states<sup>2</sup> regulate the practice of law and lawyers without an integrated bar.<sup>3</sup> In these states, a purely regulatory agency, often working under the authority of the state supreme court, sets standards for and admits applicants to the bar and runs the disciplinary system to enforce ethical rules. In Colorado, for example, the supreme court’s Board of Law Examiners admits applicants to the practice of law. *Board of Law Examiners*, Colo. Supreme Court, [https://www.coloradosupremecourt.com/ble/ble\\_home.htm](https://www.coloradosupremecourt.com/ble/ble_home.htm) (June 2, 2015) [<http://perma.cc/5A22-3YX8>]. The supreme court’s Attorney Regulation Counsel investigates and enforces the ethical rules, *Attorney Regulation Counsel*, Colo. Supreme Court, <https://www.coloradosupremecourt.com/Regulation/Regulation.asp> (June 2, 2015)

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<sup>1</sup> A voice, ironically, that actually threatens the individual rights of Arizona’s attorneys, as described in Section V.

<sup>2</sup> Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont.

<sup>3</sup> Granted, this leaves a majority of states with an “integrated” bar. But there are varying scopes of authority for these “integrated” bars. For example, after recent reforms, California’s integrated bar is “about as close to a pure regulatory bar as there is in the country” and the bar’s “discussions now are driven by what is in the best interests of the people of California rather than what is in the interests of the attorneys.” Aug. 22, 2014 Task Force Meeting Minutes at 6, <http://www.azcourts.gov/Portals/74/GOV/09192014/1Draft.minutes%20082214.pdf> (testimony of Joseph Dunn, then executive director of the State Bar of California). By contrast, as set forth in Sections III and IV, *infra*, Arizona’s integrated bar is the opposite; it has been largely stripped of its public-protection regulatory powers and exists almost exclusively as a trade association for lawyers.

[<http://perma.cc/3WY7-QZRC>], and unauthorized practice of law regulations, *Unauthorized Practice of Law in Colorado*, Colo. Supreme Court, <https://www.coloradosupremecourt.com/Regulation/UPL.htm> (June 2, 2015) [<http://perma.cc/JL24-TGBM>]. The supreme court also has a client protection fund. *Attorneys' Fund for Client Protection*, Colo. Supreme Court, [https://www.coloradosupremecourt.com/Regulation/Attorney\\_Fund.htm](https://www.coloradosupremecourt.com/Regulation/Attorney_Fund.htm) (June 2, 2015) [<http://perma.cc/W4NS-GZEW>]. There is a Colorado Bar Association, but it is a purely voluntary organization that lacks any regulatory power. *CBA Fact Sheet*, Colo. Bar Ass'n, <http://www.cobar.org/page.cfm/ID/20413/> (June 2, 2015) [<http://perma.cc/9BUK-ZEHD>].

No other Arizona regulatory body is organized like the State Bar. The Arizona Medical Board, for example, is tasked with “protect[ing] the public from unlawful, incompetent, unqualified, impaired or unprofessional practitioners of allopathic medicine,” *i.e.*, medical doctors. A.R.S. § 32-1403(A). Although all Arizona doctors are licensed by the Medical Board and subject to its jurisdiction, there is no mandatory association aspect to medical practice in Arizona. Doctors in Arizona are not required to be members of any organization to practice; they just need to have medical licenses. *See* A.R.S. § 32-1422. There is a “trade association” for Arizona doctors: the Arizona Medical Association (ArMA). But ArMA is a purely voluntary membership organization that exercises no regulatory powers. *Ariz. Med. Ass'n*, <https://azmed.org> (June 2, 2015) [<http://perma.cc/7C4T-7T8H>].

Not only is it not necessary to have an integrated bar association, it is not advisable. The two purposes of Arizona’s State Bar—both regulator and trade association—are in fundamental conflict with each other. Unfortunately, this inherent tension is only exacerbated by the governance structure of the State Bar, which mandates that lawyers elect the controlling number of the State Bar’s governing board. Again, I grant that some of this tension has been alleviated by the Supreme Court’s stripping of regulatory powers from the Board of Governors’ oversight. But a big problem remains: The integrated bar exists as a *de facto* public agency whose Board, controlled by lawyers, spends its time taking stances that harm the public interest with the veneer of state sanction and support. This simply highlights the anachronistic and uniquely dangerous nature of Arizona’s integrated bar.

### **C. The Integrated Bar Is Controlled by Lawyers**

Governance of the Arizona State Bar is very clearly controlled by lawyers. “Membership” in the Bar is limited to (and demanded of) lawyers. No members of the public are, or can be, members of the Bar. Only the members of the Bar are entitled to vote for the Board of Governors of the Bar. Currently, there are 26 voting members of the Board (30 overall). Nineteen of these voting members are elected attorney members; that is, they are lawyers elected to the Board exclusively by other lawyers. Three voting members are “at-large” members appointed by the Supreme Court and may be lawyers or not. The remaining four voting members are “public members” appointed by the rest of the Board. Thus does the Board of Governors consist “primarily [of] lawyers elected by Bar members.” *About Us*, State Bar of Ariz., *supra*.<sup>4</sup>

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<sup>4</sup> Again for sake of comparison, Arizona doctors do not elect members of the Medical Board; all members are appointed by the governor. A.R.S. § 32-1402(A).

But even the “public members” arguably represent lawyers. It is only these four “non-lawyers who are appointed to represent the public.” *Id.* Because these “public” members are appointed by the Board which consists primarily of lawyer-elected members, lawyers—not the public—control which “public” members serve on the Board. This creates a clear risk that lawyers can select “public members” not for their representation of the public, but rather their allegiance to lawyers.

Were the State Bar a private, voluntary association, this would be all well and good. Voluntary associations may organize themselves largely as they please. But the State Bar is not a voluntary organization; it is a part of the government. It is established by the Arizona Supreme Court and tasked with assisting in the regulation of the practice of law. Ariz. R. Sup. Ct. 32. It claims regulatory powers. *About Us*, State Bar of Ariz., *supra*. Because the State Bar is exercising regulatory power, it is exercising state power.<sup>5</sup> State power is to be exercised for the benefit of the public, not for the benefit of a small interest group such as lawyers.

The governance structure of the State Bar creates a “constituency problem.” Lawyers who are elected to the State Bar by their peers will tend to view themselves as representing lawyer constituents, not the public that never voted for them and never could vote against them. This common sense observation is borne out in the materials this Task Force has reviewed, including the 2011 Report and Recommendations of the State Bar of California Governance in the Public Interest Task Force (the “California Bar Report”), <http://www.azcourts.gov/Portals/74/GOV/08222014/CABarTFReport2011.pdf>. The California task force, like this Task Force, was charged with reviewing the duties and governance of the state’s integrated state bar. The minority group of the California task force expressly recognized the constituency problem caused by elected lawyer members of their state bar. California Bar Report at 48-49. Notably, that minority consisted, with just one exception, entirely of non-lawyers. All the lawyers on that task force, again with the one exception, made excuses for why the constituency problem was not important, *id.* at 42, but also, contradictorily, argued that it was important for lawyers to view themselves as constituents of the bar, *id.* at 29.<sup>6</sup>

The Arizona State Bar’s constituency problem is amply demonstrated by the letter the State Bar president-elect wrote to this Task Force and his subsequent comments at this Task

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<sup>5</sup> It should be noted here that the State Bar claims it “is not a state agency.” *About Us*, State Bar of Ariz., *supra*. But it claims regulatory power under Supreme Court rules, *id.*, and it is unconstitutional to delegate regulatory power to a private party. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (delegations of regulatory power to private parties are impermissible); *Parrack v. City of Phoenix*, 86 Ariz. 88, 91, 340 P.2d 997, 998 (Ariz. 1959) (same); *Industrial Comm’n v. C & D Pipeline*, 125 Ariz. 64, 66, 607 P.2d 383, 385 (Ariz. App. 1979) (same). Accordingly, the State Bar must be a government entity, otherwise it would be unconstitutionally exercising regulatory powers. Indeed, the U.S. Supreme Court has already recognized that the State Bar of Arizona is a state agency. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (noting that the Arizona State Bar acts as an agent of the Arizona Supreme Court—a part of the State—when it exercise regulatory powers).

<sup>6</sup> The very process the California task force employed to study its bar association demonstrated the constituency bias for lawyers. The California task force repeatedly sought input and comment on the bar’s duties and governance from lawyers, but almost never from the public. See California Bar Report at 21-28 (recounting dozens of contacts and outreach efforts with lawyers, but only two public meetings). One-sided comment, just like election by only one interest group, can hardly encourage faith that any regulatory body, including a state bar, truly has the best interests of the public as a whole in mind.

Force's February meeting. See Feb. 19, 2015 Task Force Meeting Minutes at 1, <http://www.azcourts.gov/Portals/74/GOV/2015/04232015/MeetingPktPOST.pdf>. The president-elect's letter focuses entirely on the issue of representation of "members" by the State Bar. The president-elect repeatedly notes that this Task Force's (rather mild) recommendations will lead to "membership" having a diminished role in the governance of the State Bar. And the president-elect further complains that if the State Bar's governing board is no longer elected by lawyers, lawyers will no longer enjoy "the privilege of self-regulation."

Ultimately, as the president-elect's letter demonstrates, the State Bar's constituency problem means that only lawyers, not the public, have any real influence at the State Bar:

While Bar membership surveys show that a small but significant minority of the membership of the State Bar currently has an unfavorable view of the Bar, many of those who are unsatisfied take solace in the fact that they can go to their largely elected Board or to their elected representative and address their complaints. Each time they do, there is at least an implied (though sometimes direct) threat that if the Board or Board member does not satisfactorily deal with the issue, they will seek to elect a new Board or Board members at the next Board elections.

But when the public is unsatisfied with the State Bar's actions, the public has no such recourse.

Even the lawyers on California task force had to admit that "[i]n all unified bar states, it is necessary to strike a balance between regulatory activities and non-regulatory [i.e., trade association] activities." California Bar Report at 46. Here in Arizona, the president-elect's and the majority of this Task Force's recommendation to leave "members" with control over the "integrated" State Bar ignores, as did those California lawyers, the reality that such "balance" is not possible when an interest group—such as lawyers—has an outsized role in the governance of a regulatory body. And in Arizona, the "balance" of Arizona's integrated bar is almost entirely on the trade association side because the Supreme Court has largely removed the public-protection powers from the Board of Governors; those powers now reside in the hands of separate volunteer committees and professional staff that do not report to the lawyer-controlled governing board of the State Bar.

#### **D. The State Bar, Public Choice Theory, and *Dental Examiners***

It is good that the Supreme Court has largely stripped the integrated bar of regulatory powers. When an economic interest group is given free rein to enact regulations that exclude potential competitors from the marketplace, we should expect that group to use its power in the service of its own private interests and those of its friends, rather than legitimate governmental interests. One does not need a Ph.D. in economics—or even a particularly keen insight into human nature—to understand this. Nevertheless, economists and others in the field of research known as "public choice economics" have repeatedly proven that regulation frequently reflects the dominant influence of politically powerful interest groups, not the interests of voters, consumers, or would-be competitors. E.g. James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091, 1100 (2005) ("The interest group most able to translate its demand for a policy preference into political

pressure is the one most likely to achieve its desired outcome.”); Richard A. Posner, *Economic Analysis of Law* § 19.3 at 534-36 (6th ed. 2003) (governmental policies—particularly economic policies—often do not reflect the interests of the public and instead generally reflect the comparative advantage of special interests to organize and exert influence relative to the public).

Two important concepts elucidated by public choice theory are “rent-seeking” and “regulatory capture.” Rent-seeking is the term used to describe the expected phenomenon of an economic interest group seeking advantage through government regulation. Classic examples of rent-seeking include tariffs, subsidies, discriminatory taxes, and regulations that prevent competition with the interest group, such as occupational licensing. Regulatory capture is the term used to describe the common scenario in which an economic interest group controls a regulatory agency, such that the regulatory agency advances the commercial or special concerns of interest groups that dominate the industry or sector it is charged with regulating, rather than pursues the public interest.

The problem of government regulation for private gain has been confronted in many fields but is clearly explained in the very recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015). The North Carolina State Board of Dental Examiners is the regulatory agency established to regulate the practice of dentistry in North Carolina. The clear majority of the members of this board (six of eight) are elected to office exclusively by North Carolina dentists. *Id.* at 1108. In exercising its regulatory power, the board began to prosecute nondentists offering teeth whitening services in North Carolina. These teeth whiteners were offering over-the-counter teeth whitening kits—which are available to the public in any drug store—in various salon, spa, and even mall kiosk settings. There was no threat to the public health or safety from these teeth whitening services, and no difference between these services and the over-the-counter teeth whitening kits available for sale elsewhere. Nevertheless, the board began to shut down these teeth whiteners.

What can explain the board’s efforts? The U.S. Supreme Court explained it succinctly:

In the 1990’s, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board’s 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

*Id.* at 1108.

Ultimately, the board’s actions against nondentist teeth whiteners “had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.” *Id.* Thus, dentists used the power granted to them through the board to prevent competition with dentists at

the expense of consumers, a classic case of regulatory capture and rent-seeking.<sup>7</sup> This led the Federal Trade Commission to sue the board for anti-competitive practices.<sup>8</sup>

The Supreme Court held that the board’s structure meant it could be sued for antitrust violations. As the Court explained,

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

*Id.* at 1111. Further, “[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose [a] risk of self-dealing . . . . This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.” *Id.* at 1114.<sup>9</sup>

The *Dental Examiners* decision directly implicates the reforms necessary to protect the public from an integrated bar. Like the Dental Examiners Board, an integrated bar is in a position to foster anticompetitive regulations and actions for the benefit of lawyers, not the public. *See also Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”). An integrated bar, like the Dental Examiners Board, is clearly controlled by market participants elected exclusively by other market participants. Indeed, left with a full contingent of regulatory powers, an integrated bar is inherently *more* dangerous than the Dental Examiners Board because an integrated bar is also the trade association for lawyers, *see* Feb. 19, 2015 Task Force Meeting Minutes at 1 (“although the [State Bar’s] role is to safeguard the interests of the public, it is also the voice of Arizona’s attorneys”), an inherent conflict of interest that not even the Dental Examiners Board labored under.

Unfortunately, the history of the Arizona State Bar is littered with examples of its engaging in anticompetitive practices similar to those engaged in by the North Carolina Dental

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<sup>7</sup> The dissent also recognized that the board’s actions were meant only to benefit dentists, not the public. *Dental Exam’rs*, 135 S. Ct. at 1117 (Alito, J., dissenting) (“Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.”).

<sup>8</sup> The FTC has recognized regulatory capture and rent-seeking in other industries, such as funeral directors. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 218-19 (5th Cir. 2013) (brief history of FTC “Funeral Rule,” promulgated to combat unfair and deceptive practices of funeral providers because FTC “could not rely on state funeral licensing boards to curb such practices because the state boards were ‘dominated by funeral directors’”).

<sup>9</sup> Thus, to escape antitrust liability, the Court required the board to identify “clearly articulated” state policy to displace competition and also “active supervision” by an electorally or politically-accountable officer or subdivision of the state. *Dental Exam’rs*, 135 S. Ct. at 1110. The board could not do so.



Examiners Board and condemned by the U.S. Supreme Court. This history more than justifies the steps the Supreme Court has already taken to strip the integrated bar of its regulatory powers and the further steps necessary to finish the task the Supreme Court has started.

## II. The State Bar's History of Protectionist Actions

Arizona's State Bar has behaved exactly as public choice economics would predict: It has served to protect the interests of lawyers to the detriment of the public.<sup>10</sup> To be sure, the State Bar often adopts the rhetoric of protection of the public when taking anticompetitive stances, but there is no reason the public can or should put its faith in the Bar's claims.<sup>11</sup> Indeed, the Arizona Constitution has been shaped in part by the public's negative reaction to the Bar's obvious anti-public, lawyer-protectionist activities. Part A describes the State Bar's anticompetitive actions against Arizona realtors. Part B describes similar actions against document preparers. Part C describes the State Bar's opposition to out-of-state lawyers. Part D discusses "access to justice" and demonstrates how these instances of anticompetitive behavior are attributable to the self-interest of lawyers and threaten the public's interest.

### A. The State Bar vs. Realtors

The classic example of the State Bar's self-serving was directed against real estate agents and resulted in the addition of a new article to our Constitution to limit the Bar's power. By the early 1960s, relations between Arizona lawyers and real estate agents were in a state of "deterioration" because of competition between the two groups for the business of preparing documents incident to real estate sales, leases, and other transactions. Merton E. Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A. J. 139 (Feb. 1963). The State Bar, concerned with "increasing lawyers' incomes" and (or perhaps more accurately, by) "stopping the unauthorized practice of law," *id.*, brought a lawsuit to prevent real estate agents from preparing documents the agents had long prepared.<sup>12</sup> This was the beginning of what ultimately

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<sup>10</sup> So as to not unduly pick on the Arizona State Bar, but also to demonstrate the predictability of its misbehavior, it should be noted that bar associations across the country are engaging in anticompetitive behavior, leading to many calls for reform. *The Wall Street Journal*, for example, recently noted that the "booming innovation currently going on in the market for legal services" is being thwarted by bar associations across the country. Tom Gordon, *Hell Hath No Fury Like a Lawyer Scorned*, Wall St. J. (Jan. 28, 2015), <http://www.wsj.com/articles/tom-gordon-hell-hath-no-fury-like-a-lawyer-scorned-1422489433>.

<sup>11</sup> See Edwardo Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. Times (Jan. 27, 2015), <http://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html> ("Professional organizations that push for licenses can't say, 'We want to erect a fence around our occupation,' so they say it is to protect public health and safety," said Dick M. Carpenter II, research director at the Institute for Justice. "It is an assertion with zero evidence.").

<sup>12</sup> The Arizona State Bar was not the only bar to do so. As explained in Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers" – The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 Cal. W. L. Rev. 65 (2009), the "organized bar" first focused on curbing the unauthorized practice of law in the 1920s and, at that time, its main strategy was to lobby state legislatures to enact definitions of the practice of law. This legislative campaign, however, was not successful, in part owing to the lobbying efforts of other interest groups, such as title companies and realtors. Very few state legislatures enacted a definition of the practice of law, and the legislative efforts waned. Thereafter, when the legal profession's income fell dramatically during the Great Depression, the organized bar renewed its regulatory efforts. Although the regulatory push was made to increase lawyer income, the rallying cry offered in public was not, of course,

became *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76 (1961), supplemented by 91 Ariz. 293 (1962), in which the Arizona Supreme Court held that title company employees merely filling in the blanks on standard form contracts for the purchase of real estate were engaged in the unauthorized practice of law and had to stop.

The State Bar’s action—and the Arizona Supreme Court’s decision—was great for lawyers, but not for the public. The public squarely rejected both the Bar and the Court and swiftly moved to limit lawyer power. In 1962, Article 26 to the Arizona Constitution was proposed and adopted by the public. Article 26—which remains in effect today—expressly protects real estate brokers’ and salesmen’s drafting and completion of common real-estate documents from State Bar prosecution. “Although neither attorneys nor real estate brokers seem to be held in particularly high public esteem, the latter clearly won this test in the court of public opinion because the vote on the amendment was better than three to one in favor.” John D. Leshy, *The Arizona State Constitution* 405-06 (Oxford Univ. Press 2011); see also Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won’t Go Away*, 34 Ariz. St. L.J. 585, 588 (2002) (“Although the Court in *Arizona Title* noted the puritan hostility to lawyers, perhaps they did not anticipate that Arizona’s populist tradition persisted and that anti-lawyer sentiments were also strong in Arizona. Despite, or perhaps because of, the strong opposition of the Arizona Bar, the Arizona voters approved the proposition by an overwhelming four to one margin.”).

## **B. The State Bar vs. Document Preparers**

The State Bar’s effort to regulate document preparers out of existence is a similar, more recent, example of self-serving anticompetitive regulatory action.

After Arizona did away with statutory restrictions on the unauthorized practice of law in the mid-1980s, entrepreneurs recognized a large, unmet demand for basic, low-cost legal services and created the document preparation industry in Arizona. In 2002, the State Bar petitioned to amend the Arizona Supreme Court’s rules in part to define the unauthorized practice of law in a manner that would have shut down the entire document preparation industry. Petition to Amend Rule 31 and to Add Rules 32, 76-80, Ariz. R. Sup. Ct., Rule 28 Petition No. R-02-0017.<sup>13</sup> As it did against real-estate agents, the State Bar argued a “public interest” in shutting down its competition. Specifically, the State Bar claimed that “[i]n 2001, alone, the State Bar of Arizona received four hundred complaints, alleging that ‘non-lawyers’ were practicing law in Arizona. Arizona consumers have lost homes, financial resources, and their

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“increased lawyer income.” It was, as it remains today, “improving the integrity of the bar and protecting the public from unqualified practitioners.” *Id.* at 68. Knowing the reception they had received in the legislatures, the organized bar changed tactics and focused on arguing that only the courts could regulate the practice of law, filing hundreds of lawsuits across the country against individuals and corporations allegedly engaged in the unauthorized practice of law. As a result, many state bars became self-regulating “to serve protectionist interests of a private trade group—the bar—which had the cooperation of judiciary due to their shared membership in the legal profession.” *Id.* at 71.

<sup>13</sup> A fuller telling of the politics of the repeal of the statutory restrictions on the unauthorized practice of law and nearly twenty years of conflict preceding this petition for rule change is provided by Prof. Jonathan Rose in *Unauthorized Practice of Law in Arizona*, 34 Ariz. St. L.J. at 590-95.

right to pursue a legal action as a result of non-lawyers engaging in the unauthorized practice of law.” *Id.* at 3.

The State Bar’s claims were not true, however. The Institute for Justice conducted a contemporaneous review of those (fewer than 400) “complaints.” This review indicated that 123 of these “complaints” were nothing more than copies of advertisements, 26 of the complaints were against licensed attorneys, only 11 complaints were actually filed by a consumer against a document preparer, and not a single complaint alleged a loss of a house or demonstrated with any degree of reliability that the right to pursue a legal action was lost. Institute for Justice Comment on State Bar’s Petition R-02-0017 at 6-7.

Not only were very few of these “complaints” filed by consumers, but many, many more were filed by Arizona lawyers or other State Bar-related individuals, a fact that should surprise no one. At least 74 of the complaints were made by lawyers (nearly seven times the number of consumer complaints), another 10 were made by the State Bar’s unauthorized practice of law counsel and her husband, and 14 more were made by State Bar personnel or their spouses. *Id.*

The effort to gin up complaints was part of a larger State Bar effort against document preparers. In earlier years the then State Bar president had solicited Bar members “who knew of the past ‘horror stories involving inept, incompetent or dishonest document preparers’ to write and call members of the [legislature] and to have their support staff, family members, friends, and the victims do so as well” in order to support regulations against document preparers. Rose, *Unauthorized Practice of Law in Arizona*, 34 Ariz. St. L.J. at 593. And the State Bar had, in 1999, “hired a full time lawyer ‘to warn the public that paralegals are bad news[.]’” *Id.* at 594.

Again, the public and publically accountable entities had to counteract the State Bar’s anticompetitive efforts. There was an outcry by the public when people realized what the State Bar was attempting. See, e.g., *Let Paralegals Do Their Jobs*, E. Valley Tribune, May 9, 2002; see also Rose, *Unauthorized Practice of Law in Arizona*, 34 Ariz. St. L.J. at 592-95. Ultimately, the Arizona Supreme Court appointed an ad hoc working group—which, unlike the State Bar, included lawyers *and* document preparers—to explore options available to allow document preparers to continue their practice. The State Bar was forced to amend its petition to permit some document preparers. See Amendment to Petition No. R-02-0017.

### **C. The State Bar vs. Out-of-State Lawyers**

In addition to opposing competition from non-lawyers, the State Bar has opposed competition from out-of-state lawyers, particularly with regard to “admission by motion.” Admission by motion allows lawyers practicing outside of Arizona to practice in Arizona without sitting for the bar exam if they have sufficient experience. This, many Arizona lawyers objected, would lead to increased competition. Thus, admission by motion was ultimately adopted only after years of effort and over the objections of the State Bar.

In 2001, a task force appointed by the Arizona Supreme Court recommended that the Board of Governors adopt a number of proposals by ABA’s Commission on Multijurisdictional Practice, including admission by motion. In 2002, the Board of Governors responded to the ABA by “express[ing] no view” on admission by motion. Nevertheless, in 2002, the ABA

approved a model rule on admission by motion, and the Conference of Chief Justices recommended adoption of the rule. The task force again asked the Board of Governors to support the ABA's proposals and to petition the Arizona Supreme Court for adoption of all necessary rule changes, but the Board of Governors voted to approve all of the recommendations *except* for admission by motion in 2003.

A rule petition to permit admission by motion was not filed until 2006, and only then by a private lawyer, not the State Bar. Petition to Revise Rule for Admission to the State Bar of Arizona, Petition No. R-06-0017, [http://azdnn.dnnmax.com/Portals/0/NTForums\\_Attach/11011502584758.DOC](http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/11011502584758.DOC). In the debate that followed, lawyers argued about their own pecuniary interest in allowing admission by motion or not. See Tim Eigo, *Sea to Sea: Admission on Motion Comes to Arizona*, Ariz. Att'y, Dec. 2008, at 14, [http://www.myazbar.org/AZAttorney/PDF\\_Articles/1208mjp2.pdf](http://www.myazbar.org/AZAttorney/PDF_Articles/1208mjp2.pdf) (“AZAT: Why did you file the petition in favor of admission on motion for Arizona? BURR: There are several reasons behind it, but the biggest one is money. I know people are concerned that other firms are going to come in, but we're losing money.”).

Though there is no evidence the public was asked for its views, the State Bar surveyed its members about the petition. Of the nearly 2,200 active State Bar members who responded to the survey, 60% opposed admission on motion. Comment of the State Bar Opposing Petition to Revise Rule for Admission to the State Bar of Arizona, Petition No. R-06-0017 at 2, [http://azdnn.dnnmax.com/Portals/0/NTForums\\_Attach/16554566971.pdf](http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/16554566971.pdf). The Board of Governors of the State Bar thereafter voted 17-3 to oppose the petition. *Id.* at 1.

The reasons the State Bar gave for opposing the petition included expressly protectionist ones:

The proposed rule change would make most lawyers in the Nation eligible for unlimited admission to practice law in Arizona, without being tested on their knowledge of Arizona law, rules or practice. As a Sunbelt state with the fastest-growing population in the Nation, Arizona will become the perfect target for expansion by out-of-state firms, including those with substantial advertising budgets, regardless of whether they have any substantial Arizona practice, reside here, or know Arizona law.

Proponents of this change argue that eliminating Arizona's bar exam requirement will benefit Arizona lawyers by making them eligible for admission on motion to other states. Our Sunbelt neighbors, however – California, New Mexico and Nevada – do not permit admission on motion. Thus, this proposal will simply not enlarge or improve the practice of most Arizona lawyers.

*Id.* at 2.

The comments offered by lawyers about the petition were similarly focused on whether the proposed rule was good for lawyers or bad for lawyers. Very little debate about the public good from potential increased competition, such as lower legal costs or more consumer options, was had. See generally *R-06-0017 Revision*, Ariz. Court Rules Forum, <http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/>

[CourtRulesForum/tabid/91/forumid/7/postid/204/view/topic/Default.aspx](http://CourtRulesForum/tabid/91/forumid/7/postid/204/view/topic/Default.aspx). And recent debate about expansion of admission by motion has similarly focused on lawyer interests, not the public interest. See Opposition of Attorney Regulation Advisory Committee to Petition to Amend Rule 34(f)(1)(A), Rules of the Supreme Court, Petition No. R-12-0005 at 1, [http://azdnn.dnnmax.com/Portals/0/NTForums\\_Attach/1619374145571.pdf](http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1619374145571.pdf) (objecting to expansion of waiver because of a feared “one-way influx of attorneys into Arizona without allowing mobility of Arizona attorneys”); Comment of the State Bar of Arizona on Petition to Amend Rule 38(h)(1)(A), Ariz. R. Sup. Ct., Petition No. R-12-0005, [http://azdnn.dnnmax.com/Portals/0/NTForums\\_Attach/1521314573729.pdf](http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1521314573729.pdf) (supporting petition based on portability benefits to lawyers, but noting concern that lawyer portability could be harmed).

#### **D. The State Bar vs. Access to Justice**

These examples highlight a particular blind spot of state bars that has come into recent focus: the public interest in lower-cost alternatives to lawyers. The Arizona State Bar proclaims that “access to justice” is one of its goals. *Mission, Vision, and Core Values*, State Bar of Ariz., <http://www.azbar.org/aboutus/mission.vision.andcorevalues> (June 2, 2015) [<http://perma.cc/TZM6-2PNK>]. But in practice, this slogan has meant access to a lawyer, preferably one in Arizona. As its prior treatment of real estate agents and document preparers demonstrates, public access to non-lawyers who are in a position to help consumers for lower costs has been fought by the State Bar.

Demanding lawyer training in order to provide any legal service harms not just entrepreneurs but also consumers. *The Boston Globe*, quoting one legal expert, reported that “there are states where as many as ‘98 percent of people facing eviction or debt collection show up in court without a lawyer—without any legal help. That’s stunning. And it’s indefensible.” Leon Neyfakh, *How Requiring Too Much Training Hurts Workers and Consumers Alike*, *Bos. Globe* (Jan. 11, 2015), <http://www.bostonglobe.com/ideas/2015/01/11/how-requiring-too-much-training-hurts-workers-and-consumers-alike/oAXFzNY37P9V9sy9W3WuJM/story.html>. A 2013 study by legal-service provider LegalShield found that the average annual expenditure for legal services by small businesses is \$7,600 and, as a result, 60% of small businesses go without assistance in facing serious legal problems. Tom Gordon, *Hell Hath No Fury Like a Lawyer Scorned*, *Wall St. J.* (Jan. 28, 2015), <http://www.wsj.com/articles/tom-gordon-hell-hath-no-fury-like-a-lawyer-scorned-1422489433>. Common experience similarly shows that many Arizonans are unable to afford to retain an attorney to assist them in a variety of legal settings.

Would members of the public really be worse off if they could turn to people other than lawyers for assistance? *The Boston Globe* editorial board thought not, and called on Massachusetts to identify the areas in which non-lawyers could practice. Editorial, *Mass. Must Be Creative in Helping Poor Residents with Civil Cases*, *Bos. Globe* (Jan. 22, 2015), <http://www.bostonglobe.com/opinion/editorials/2015/01/21/mass-must-creative-helping-poor-residents-with-civil-cases/vwu5QEfPtSYMfQxTUyIAO/story.html>. Other commentators have called for abandoning the bar exam as a prerequisite to offering legal services because it does not protect consumers but “merely creates an artificial barrier that keeps many people from competing in the market for legal services.” George Leef, *True Or False: We Need The Bar Exam To Ensure Lawyer Competence*, *Forbes* (Apr. 22, 2015), <http://www.forbes.com/sites/georgeleef/>

[2015/04/22/true-or-false-we-need-the-bar-exam-to-ensure-lawyer-competence/](https://www.brookings.edu/blog/first-things-we-do-lets-deregulate-all-the-lawyers/2015/04/22/true-or-false-we-need-the-bar-exam-to-ensure-lawyer-competence/). Similarly, authors with the Brookings Institution have argued that numerous regulations on the practice of law implemented and maintained by lawyers create significant social costs, hamper innovation, misallocate the nation's labor resources, and create socially perverse incentives that cannot be economically justified. Clifford Winston, Robert Crandall, and Vikram Maheshri, *First Thing We Do, Let's Deregulate All the Lawyers* (Brookings Institution Press 2011).

Rigid insistence that only lawyers can “practice law” is not borne out by facts. A 2013 study found that more than two-thirds of lawyers in charge of state agencies responsible for enforcing unauthorized-practice laws could not even name a situation during the past year where an unauthorized-practice issue had caused serious public harm. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587, 2595 (2014). Not surprisingly, the study also found that the most common source of referrals for enforcement action was attorneys, *id.* at 2591-92, who stand to profit from restricting competition. The study concluded that “unauthorized-practice law needs to increase its focus on the public rather than the profession's interest and that judicial decisions and enforcement practices need to adjust accordingly.” *Id.* at 2588.

Given the State Bar of Arizona's “two masters,” its governing structure, its history, examples like *North Carolina State Board of Dental Examiners*, and common sense, the public is justified in believing the State Bar incapable of unbiased consideration of the costs and benefits of proposals that would expand “access to justice,” even if not expanding “access to lawyers.” Even assuming that lawyers provide the highest level of legal service, consumers may need or desire, or, indeed, may only be able to afford, a “lower” level of legal service. “Access to justice” no more requires access to lawyers than “access to transportation” demands access to BMWs. Some people can only afford a Ford and not a BMW. Some people prefer a Ford to a BMW. Consumers deserve lower-cost options in the legal field just as they do in the transportation field. We would immediately reject the notion that only BMW could decide what transportation options the public was allowed. So too should we reject the notion that only lawyers may decide what legal-assistance options the public is allowed.

### **III. Because the Supreme Court Has Taken Away Core Public-Protection Functions from the Board of Governors, the Elimination of Arizona's Integrated Bar Will Not Adversely Affect Protection of the Public**

The examples above demonstrate that the integrated State Bar has really been looking out for the economic interests of lawyers. This is bad, and it needs to stop. Stopping the integrated bar's abuses will not cause collateral damage to the core public-protection functions of the State Bar because, as noted above, the Arizona Supreme Court has already removed most of those functions from the oversight of the lawyer-elected Board of Governors.

The functions of the State Bar that serve to protect the public are today handled either by separate committees or other groups at the Supreme Court or professional staff at the State Bar free from the control of the Board of Governors:

- Judging the qualifications of applicants and admission to the Bar is not handled by the State Bar. Rather, these functions are handled by professional staff and separate volunteer committees housed at the Court itself. Ariz. R. Sup. Ct. 33.
- Prosecution of lawyer disciplinary matters is handled as if the State Bar were a purely regulatory body. The Court has established a professional disciplinary prosecution department that, though physically housed in the State Bar's offices, is not overseen by the State Bar's Board of Governors. As the current State Bar president-elect has explained, "the Board is no longer directly involved in individual cases of attorney discipline. Still, the Board does ultimately oversee the budget of the disciplinary department."
- Adjudication of disciplinary matters is no longer handled by the State Bar. The Court has created a permanent, separate disciplinary judge and hearing panels to adjudicate disciplinary matters. The chief justice, not the State Bar, is responsible for the disciplinary judge and hearing panels. Ariz. R. Sup. Ct. 51 & 52.
- Prosecution of the unlicensed practice of law is handled as the prosecution of lawyer discipline is handled. Ariz. R. Sup. Ct. 31(a)(2)(B), 46(b), 77(b).
- Adjudication of the unlicensed practice is handled by the same disciplinary judge and hearing panels that hear lawyer discipline prosecutions or by the Superior Court. Ariz. R. Sup. Ct. 75(a), 79(a).
- Although the State Bar created a Client Protection Fund at the direction of the Supreme Court, the Fund itself is, and always has been, "an entity separate from the State Bar," governed and administered by a separate Board of Trustees and funded separately from the State Bar. Supreme Court of Arizona, Client Protection Fund 2013 Annual Report 2-3, 9, [http://www.azbar.org/media/752431/2013\\_cpf\\_annual\\_report\\_final.pdf](http://www.azbar.org/media/752431/2013_cpf_annual_report_final.pdf) [<http://perma.cc/K7RS-KH7T>].
- The State Bar has no role in the regulation of non-lawyer legal-related professionals, including, among others, certified document preparers. *E.g.*, Ariz. R. Sup. Ct. 31(d)(24-25, 30). These professionals are instead regulated by the Court itself. *Certification & Licensing*, Arizona Supreme Court, Certification and Licensing Div., <https://www.azcourts.gov/cld/Home.aspx> (June 2, 2015) [<http://perma.cc/CX5E-YLHF>].

Even the majority of the Task Force recognizes that "[a]ttorney admissions and disciplin[e] are primarily functions of the Supreme Court, and to a lesser degree, of the SBA's professional staff, which reports to the SBA's director rather than to the board." May 8, 2015 Task Force Draft Report at 13.

Taken together, these powers represent the core of the State Bar's public-protection function: the power to determine who may be a lawyer in Arizona; the prosecution and adjudication of lawyers whose actions threaten the public; the maintenance of a client protection

fund; and the regulation, prosecution, and adjudication of non-lawyers working in legal-related fields. When compared to the remainder of the State Bar’s powers and functions—discussed below—it is apparent that these powers represent the core of the public-protection regulatory function the State Bar claims. Indeed, the powers denied to the Board of Governors (and thus, to the part of the State Bar over which it has oversight) by our Supreme Court mirror almost exactly the powers that regulatory agencies in non-integrated bar association states exercise, such as in Colorado. *See* Section I.B. *supra*.

The Task Force has not suggested giving authority over these core functions back to the renamed Board of Trustees. This is good. For the reasons set forth above, the integrated State Bar controlled by lawyers should not have these powers. But for the purposes of the most important thing the State Bar does—public protection—the current arrangement essentially makes the State Bar not an integrated bar association, but rather a regulatory-only body. Indeed, from a public-protection perspective, de-unifying the State Bar and abolishing the Board of Governors would hardly be noticed. This raises the question of what public good the State Bar and Board of Governors, as they actually function today, are serving.

#### **IV. What is Left of The Integrated State Bar Is Not Worth the Cost**

The integrated bar is not a good in and of itself; a mandatory bar must be justified by its benefit to the public. The Supreme Court has stripped the core public-protection powers from the integrated State Bar’s Board of Governors and continues to run them separately or through the State Bar’s professional staff as a regulatory-only agency. Given this, what marginal benefit—to the public, not to lawyers—exists from the integrated State Bar’s continued existence? None at all for the most part. Not much at best. And probably not anything that justifies the costs.<sup>14</sup>

Based on the State Bar’s most recent numbers, it spent substantial amounts on functions—tellingly deemed “discretionary”—of dubious utility to the public. Jan. 14, 2015 Task Force Meeting Packet at 37-42, <http://www.azcourts.gov/Portals/74/GOV/2015/01142015/MeetingPacketPost.pdf>. These functions are where the costs of the “trade association” aspects of the State Bar—providing services to members, rather than protecting the public—come into focus:

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<sup>14</sup> The State Bar itself has estimated that, of the \$460 in annual dues an active member must pay, “\$350 . . . are used for mandatory functions.” *Dues Increase FAQ*, State Bar of Ariz., <http://www.azbar.org/aboutus/leadership/boardofgovernors/importantissues/duesincreaseeffective2015/duesincreasefaq> (June 2, 2015) [<http://perma.cc/5FMH-LRLX>]. These “mandatory functions” are mostly, though not entirely, what this letter considers the core of the Bar’s public-protection mission, including lawyer regulation and unauthorized practice of law prosecution, *see* Task Force Meeting Packet Jan 14, 2015 at 37-42, <http://www.azcourts.gov/Portals/74/GOV/2015/01142015/MeetingPacketPost.pdf>, and the costs of other core functions, such as conducting admissions and the client protection fund, are funded separately from State Bar dues. “The remaining \$110 [of an active member’s annual dues] is used for various discretionary programs . . .” *Dues Increase FAQ*, *supra*. These “discretionary functions,” as explained below, are the State Bar’s trade association “member services” that are not closely related to public protection.



- \$683,974 on 28 sections;<sup>15</sup>
- \$683,738 on the resource call center;<sup>16</sup>
- \$354,812 on member and public relations;
- \$308,846 on 28 standing committees;
- \$188,278 on Bar publications for members;
- \$175,433 on mental health assistance for members;
- \$144,616 on government relations (lobbying and outreach);
- \$140,433 on voluntary fee arbitration for lawyers<sup>17</sup> and their clients;
- \$130,460 on a directory of members;
- \$105,349 on “member benefits,” *i.e.*, paying for member discounts.<sup>18</sup>

Other services to members may be indirectly related to legitimate public benefits and thus less objectionable than the above expenditures. However, it is not clear that these services are cost-effective, marginally beneficial, impossible to provide through a regulatory-only agency, or incapable of being replicated through a voluntary association:

- \$259,782 on the ethics hotline and training;
- \$80,000 on “FastCase” free legal research.<sup>19</sup>

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<sup>15</sup> These sections are “organized around specific areas of law and practice. Sections sponsor conferences, section educational programs, publish newsletters and consumer brochures, monitor legislation, as well as make recommendations to the State Bar Board of Governors.” *Sections*, State Bar of Ariz., <http://www.azbar.org/sectionsandcommittees/sections> (June 2, 2015) [<http://perma.cc/Y6XP-E7CZ>]. Only 39% of Bar members participate in these sections. Jan. 14, 2015 Task Force Meeting Packet at 41. These sections, *e.g.*, *World Peace Through Law*, State Bar of Ariz., <http://www.azbar.org/sectionsandcommittees/sections/worldpeacethroughlaw> (June 2, 2015) [<http://perma.cc/CNM9-6NTP>], are the sorts of activities that, if actually useful, lawyers can participate in—and pay for—on their own, without requiring all lawyers (and thus the public) to subsidize them.

<sup>16</sup> Although some issues the resource call center handles may deal with public protection issues, it is apparent that much of what the resource call center relates to is member career and practice development. Career and Practice Resource Center, State Bar of Ariz., <http://www.azbar.org/professionaldevelopment/careerandpracticeresourcecenter> (June 2, 2015) [<http://perma.cc/SN76-QZKC>].

<sup>17</sup> But apparently only for 0.2% of lawyers. Jan. 14, 2015 Task Force Meeting Packet at 42.

<sup>18</sup> See *Member Discounts*, State Bar of Ariz., <http://www.azbar.org/membership/memberdiscounts> (June 2, 2015) [<http://perma.cc/L5Q7-XNHP>].

<sup>19</sup> This service is used by about 19% of members. It is defended on the grounds that it helps lawyers abide by their ethical requirement to provide competent representation. But the majority of client complaints about lawyers involve lack of communication, not lack of competence. And lawyers seem to get in more frequent trouble for client

Regardless, the questions to be answered about all these services remain the same: First, does the public benefit from these costly member services?<sup>20</sup> Not at all for most of these services, and indirectly, if at all, for the remainder. Moreover, the marginal benefit of these services to the public cannot be great. Second, are any of these “benefits” to the public justified by the costs, which are also ultimately borne by the public? Again, common sense suggests not.

There is no justification for the continuation of Arizona’s integrated state bar, which exists only to provide services to members—services that have no or minimal demonstrable public benefit while also resulting in greater licensing costs. But not only is there no real public benefit to the continuation of the integrated bar, the continuation of the integrated bar actually threatens the First Amendment rights of “member lawyers.”

## V. The Mandatory Association Threatens “Member” Rights

The “integrated” nature of the State Bar also threatens members’ First Amendment rights. Integrated bar associations “implicate the First Amendment freedom of association, which includes the freedom to choose not to associate, and the First Amendment freedom of speech, which also includes the freedom to remain silent or to avoid subsidizing group speech with which a person disagrees.” *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 712-13 (7th Cir. 2010). The starting point for any discussion of an integrated bar and the First Amendment is *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), in which the U.S. Supreme Court held that California’s integrated bar could use members’ dues only for regulating the legal profession or improving the quality of legal services, not for political or ideological activities.

*Keller*, however, is not the last word on the subject. In *Keller*, the Court admitted that “[p]recisely where the line falls between” permissible and impermissible activities “will not always be easy to discern.” *Id.* at 15. Thus, courts continue to wrestle with the *Keller* standard. *E.g.*, *Kingstad, supra*. (disagreement as to whether a public-relations campaign designed to improve the image of lawyers and the legal profession violated *Keller*). Moreover, the Supreme Court continues to have to address mandatory association in other contexts. *E.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (2014) (involving union dues and home healthcare workers). Thus, there is an inherent and ongoing potential for First Amendment violations any time an “integrated” bar acts in its “trade association” role.

Throughout the Task Force’s meetings, the executive director of the State Bar has explained the various ways in which the State Bar attempts to keep itself compliant with the

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account problems than for a lack of competence. Perhaps the State Bar should provide lawyers with secretaries and accountants instead?

<sup>20</sup> Not every State Bar program costs money. The *Arizona Attorney* magazine makes money, approximately \$10,000 for the last year in which figures are available. Jan. 14, 2015 Task Force Meeting Packet at 39. CLE classes are a cash cow for the State Bar, resulting in a \$203,879 profit in the most recent year. *Id.* Of course, that the State Bar (1) mandates CLE (though evidence that MCLE actually results in better lawyering is notably absent, Deborah L. Rhode and Lucy Buford Ricca, *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?* 22(2) *ABA The Professional Lawyer* 2 (2014)), (2) provides CLE (and makes a sizeable profit from it), and (3) regulates the sufficiency of CLE obtained from sources other than the State Bar (through post hoc audits of lawyers’ MCLE training) is another conflict of interest.

*Keller* decision. I am in no position to dispute his description at this time, and it seems reasonably clear that the Arizona State Bar has been better behaved than was the California State Bar in prompting the *Keller* case. Nevertheless, the fact remains that a mandatory bar will always present the risk of *Keller* violations. Even these many years later, state bar associations continue to run afoul of *Keller*. See *Fleck v. McDonald*, No. 1:15-cv-00013 (D.N.D. filed Feb. 3, 2015) (State Bar Association of North Dakota alleged to have contributed \$50,000 of member fees and made other contributions to a ballot question regarding judicial assumptions and the determination of parental rights); *Lautenbaugh v. Neb. State Bar Ass’n*, No. 4:12-cv-03214 (D. Neb. dismissed Sept. 26, 2014) (*Keller* lawsuit in which the state bar stipulated to preliminary injunctive relief and which resulted in settlement and restrictive rules on the use of member fees, as set out in *In re A Rule Change to Create a Voluntary State Bar of Nebraska*, 841 N.W.2d 167 (Neb. 2013)).

Moreover, by its own admission, the State Bar continues to spend its members’ dues on lobbying, electioneering, and other political speech, most prominently about the continued existence of the integrated bar itself and merit selection of judges. The State Bar lobbied against a recent legislative proposal to end Arizona’s integrated bar association and adopt a regulatory-only bar run by the Supreme Court, an idea this State Bar member argues for here. *HB2629 Attorney Licensing*, State Bar of Ariz., <http://www.azbar.org/aboutus/leadership/boardofgovernors/importantissues/hb2629attorneylicensing> (June 2, 2015) [<http://perma.cc/H9VD-XTK3>]. Further, the State Bar maintains a webpage extolling the virtues of Arizona’s “merit selection” system, Arizona Plan, <http://www.thearizonaplan.org> (June 2, 2015) [<http://perma.cc/VDT5-X4N2>], and has taken a variety of public positions with regard to merit selection with which its own members disagree, e.g., AZ Secretary of State General Election Guide 2012 - Proposition 115 Pro/Con Arguments 24-31 (including comments from the State Bar itself that conflict with a variety of positions taken by numerous lawyers on the merit selection system and proposed changes). Whether these activities fall within *Keller* or the numerous cases expounding on *Keller* since then or not—and there is reason to believe not, see *Keller*, 496 U.S. at 14 (the integrated bar is justified only to the extent its activities are “germane” to “regulating the legal profession and improving the quality of legal services”)—the State Bar is undoubtedly taking political positions that some of its members disagree with and using those members’ mandatory fees to do so.

Given that the Supreme Court has already reclaimed the major public-protection powers from the State Bar, and the remaining activities of the State Bar have little, if anything, to do with protecting the public, the threats to “member” rights posed by the integrated bar structure greatly outweigh the purported benefits of an integrated bar. These potential First Amendment problems simply add to the reasons—inherent conflict of interest, threat of regulatory capture, and unjustifiably heightened costs—why the State Bar as an integrated bar association controlled by lawyers must be abolished.

## **VI. The Supreme Court Should Formally Abolish and Replace the Integrated State Bar With a Regulatory-Only State Bar to Best Protect the Public**

Given all the above, the State Bar as it currently exists should be abolished and replaced with a purely regulatory agency—the new State Bar of Arizona. The Supreme Court has already

started to separate the trade association and regulatory functions of the State Bar by limiting public-protection regulatory powers to the Supreme Court’s own committees and divisions and/or professional staff at the State Bar who do not report to the lawyer-elected State Bar Board of Governors. Recognizing the State Bar as a purely regulatory agency will simply complete the reforms the Court has already begun. Formally separating these functions by abolishing the integrated bar is necessary because no regulatory agency should also be a “trade association” for the industry it regulates. Such an arrangement is a recipe for regulatory capture at the expense of the public because the regulatory and trade association functions of a bar cannot be “balanced,” as the lawyers on the California task force believed, and the threat from having “two masters” cannot be ignored. *Dental Examiners*, 135 S. Ct. at 1111 (“Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.”). Further, because the Supreme Court has already started down the path of separating the trade association and regulatory functions of the State Bar, ending the integrated bar would have little practical effect on the core public-protection powers of the State Bar.

Abolishing the integrated state bar will benefit the public and lawyers in other ways as well. It will remove the veneer of official sanction for the State Bar’s various anticompetitive stances taken in its trade association function. It will also reduce those costs attendant to bar membership that go solely to the trade association functions. Further, it will also protect the First Amendment rights of lawyers because no one should be forced to be a member of a trade association just to practice one’s craft,<sup>21</sup> especially where that trade association cannot claim any “public protection” justification.

Relatedly, the Court should abolish the elected Board of Governors (or Board of Trustees as the Task Force has recommended it be called) in its entirety and instead rely on professional staff to carry out the regulation of lawyers and the practice of law. This is, in large measure, what the Court has already done for purposes of lawyer regulation and unauthorized practice prosecution, so this proposal simply completes the reforms already undertaken by the Court. If necessary to assist it in the regulation of the practice of law, the Court should appoint, not elect, a small Board of Trustees that better represents the public, not lawyers. Lawyers electing lawyers simply perpetuates the State Bar’s constituency problem. Ensuring that lawyers cannot control the activities of the agency that regulates the practice of law helps head off the potential for anticompetitive acts and antitrust liability illustrated by the *Dental Examiners* case. Further, ridding the Board of the constituency problem should reduce the urge to use any remaining trade association interest in a manner that benefits lawyers at the expense of the public. Small, appointed, and not “integrated” boards are sufficient to regulate other occupations in Arizona—like medical doctors—and there is no reason to believe lawyers must be given special treatment.

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<sup>21</sup> As many critics of the State Bar have pointed out, forcing lawyers to be a member of the trade association part of the State Bar is akin to the government forcing workers in any other occupation to be a member of a trade union, which is contrary to Arizona law. This analogy cannot be rejected out of hand, as the majority of the Task Force attempts, May 8, 2015 Task Force Draft Report at 10, inasmuch as the unanimous Supreme Court in *Keller* recognized it: “There is . . . a substantial analogy between the relationship of the [integrated California] State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other.” *Keller*, 496 U.S. at 12.

The problems observed here are hinted at in this Task Force’s majority recommendations. But the majority—made up primarily of lawyers, indeed of lawyers who have served in State Bar leadership for many years—is far too comfortable with the status quo. The Task Force’s majority recommendations would not meaningfully reform the State Bar.

## **VII. The Task Force Majority Recommendations Are Not Meaningful Reforms**

If adopted, the Task Force’s current majority recommendations would be an improvement to the current system, but would not go far enough to enact the kinds of reforms of the State Bar that are needed.

Most critically, the majority’s recommendation that the State Bar remain a mandatory association fails to address the real objections to such a system or the numerous steps the Supreme Court has already taken to minimize the integrated bar. May 8, 2015 Task Force Draft Report at 9-11. The majority does not grapple with—or even mention—the inherent conflict between the regulatory and trade association functions of an integrated bar. The majority attempts to justify the integrated bar by reference to a limited number of functions the State Bar serves. *Id.* at 10. But the majority does not explain why these functions are not available to a regulatory-only bar, as they are in Colorado. Similarly, the majority does not address whether the State Bar is already serving as a regulatory-only bar in regard to its core public-protection functions, despite recognizing that many of these are already “primarily functions of the Supreme Court, and to a lesser degree, of the SBA’s professional staff, which reports to the SBA’s director rather than to the board.” *Id.* at 13. Nor does the majority address the numerous bar functions which clearly lack any public benefit justification, the unjustified increased licensing costs caused by the integrated State Bar, or the inherent threats to members’ First Amendment rights. Many other states function perfectly well without a mandatory bar and its attendant shortcomings; Arizona should join their ranks.

The Task Force does recognize that the primary mission of the State Bar should be to protect and serve the public. *Id.* at 9. Accordingly, the Task Force admits that “the Bar’s goal of protecting the public requires its board to include a significant proportion of public non-lawyer members.” *Id.* at 12. This seems like a good start, especially considering the *Dental Examiners* decision.

But the actual recommendations of the majority of the Task Force undercut the goal of having a significant, much less meaningful, proportion of public non-lawyer members on the board. The majority’s various recommendations guarantee public non-lawyer members only 20% to 33% of the board. *Id.* at 15-18. By comparison, so-called “Option Z” (formerly “Option 1”), which is the preferred option of a majority of the Task Force, *see* Apr. 23, 2015 Task Force Meeting Minutes at 6, mandates that 11 of 18 (61%) members—clearly a controlling share of the board—be elected lawyers, May 8, 2015 Task Force Draft Report at 17. Depending on who is appointed as an “at-large” member under this option, lawyers could hold 14 of 18 of the membership slots (78%) of the board. Under the other options, the proportions may not be any

better: As many as 12 of 15 members (80%) under Option X, and 12 of 18 members (66%) under Option Y, could be lawyers. *Id.* at 16-17.<sup>22</sup>

Just as the majority wants to maintain a board that underrepresents the public, it also wants to maintain some measure of the constituency problem. Every option offered by the majority keeps in place elected board members to represent lawyers in the State Bar; anywhere between 33% and 61% of the Board. This may reduce, but will still retain, lawyer constituencies. *Id.* at 16-18. Indeed, the majority's preferred Option Z—which keeps 61% of the board as elected attorney members—is the most problematic for those concerned about the constituency problem. As the majority admits, “[t]he proposed Option Z configuration would . . . maintain the character of the board as one with a majority elected by attorneys.” *Id.* at 18. The majority also admits that “[e]lections might still produce constituencies,” but then speculates that “with a smaller board, perhaps to a lesser degree.” *Id.* The public should not take any comfort in this rank speculation.

As of this writing, the Task Force has still not resolved the manner in which “public” members—who are supposed to “represent the public”—are put on the board. *See* Apr. 23, 2015 Task Force Meeting Minutes at 6. Under the current rules, public members are appointed by the board, which is dominated by elected lawyers, which increases the threat that the public members' constituency will be the board and not the public. Today, two of the majority's three options for populating the board maintain a problematic role for elected attorney members to influence the identity of the public members through nomination for appointment by the Court; the third is silent as to this potential problem. May 8, 2015 Task Force Draft Report at 16-18. Though “nomination” of public members by elected lawyers is better than outright “appointment,” it is not an adequate fix. And this half-measure is particularly baffling because elected attorney members do not nominate the “at-large” members for appointment by the Court. Especially in light of *Dental Examiners* and the State Bar's own history, this issue should be definitively resolved in favor of truly independent public members.

To the Task Force's credit, it recommends that any member of the board—including public members—can be an officer of the State Bar. *Id.* at 22. Because the only proper role of the State Bar is to protect the public, not to represent lawyers, this change is both logical and welcome.

The remainder of the Task Force's recommendations—dealing with oaths and titles, term limits, removal, and officer tracks—are fine but not important enough to discuss here. These recommendations reflect the unfortunate tendency of lawyers to focus on procedure rather than substance when confronted with a problem. *See* Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 *Ind. L.J.* 817, 822 (1993) (“[T]he Court has done what most lawyers tend to do—it has tried to find procedural solutions for a substantive problem. One of the basic traits

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<sup>22</sup> Admittedly, under Options X and Y, the Supreme Court could theoretically appoint enough non-lawyer “at large” members of the board to balance lawyer and non-lawyer members. May 8, 2015 Task Force Draft Report at 16-17. Though neither Option X nor Y is an ideal, or even good enough, reform, the theoretical possibility of lawyers not having control of the board makes them both markedly better than Option Z.

of most lawyers is an extremely strong belief in the value of procedures. Lawyers and judges tend to believe (or at least tend to pretend to believe) that, at least in theory, if a procedure can be improved enough, then the results produced by that procedure will necessarily be right.”). The problems with the State Bar will not be fixed by procedural tweaks (though these tweaks do not hurt). The more fundamental substantive reforms the Supreme Court has already enacted and that I have suggested above are the ones necessary to address the conflict of interest, regulatory capture, officially-sanctioned trade association, and First Amendment problems inherent in the current assigned duties and governance structure of the State Bar.

The Task Force has recognized the core “public choice” problem with the State Bar: the self-interest of lawyers. But, in the absence of good public-protection reasons for doing so, it has suggested half-measures to address that problem. The Court should implement more robust reforms than those recommended by the Task Force to complete the reforms the Court has already enacted to protect the public from the State Bar.

### **Conclusion**

“The first thing we do, let’s kill all the lawyers.” William Shakespeare, *The Second Part of King Henry the Sixth*, act 4, sc. 2. This, one of Shakespeare’s most famous lines, is spoken by Dick the Butcher, the otherwise forgettable henchman of rebel leader Jack Cade. Scholars have since debated the line’s meaning in its historical context. Some argue that Shakespeare’s point was to portray lawyers as the guardians of the rule of law who stand in the way of the lawless mob. Others argue Shakespeare was noting a resentment of the proliferation of lawyers among commoners, who couldn’t afford lawyers and believed lawyers were aligned with the powerful corrupt elite.

At our best, we lawyers are the guardians of the rule of law. But the powers, dual loyalties, and governance structure of the State Bar of Arizona puts lawyers in the position of the powerful elite, able to corrupt the power of the government to our benefit. It does not need to be this way to protect the public, as the Arizona Supreme Court has already tacitly recognized in reclaiming the core public-protection functions from the State Bar and the experience of at least 18 other states demonstrates. The Task Force’s majority recommendations are a step in the right direction of reforming the State Bar, but those recommendations do not go far enough to protect the public from *us*.

Sincerely,

Paul Avelar  
Attorney  
Institute for Justice

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# Sick of lawyers? New software might help

By Sudhin Thanawala Associated Press

SAN FRANCISCO — Imagine working out a divorce without hiring an attorney or stepping into court, or disputing the tax assessment on your home completely online.

A Silicon Valley company is starting to make both possibilities a reality with software that experts say represents the next wave of technology in which the law is turned into computer code that can solve legal battles without the need for a judge or attorney.

“We’re not quite at the Google (self-driving) car stage in law, but there are no conceptual or technical barriers to what we’re talking about,” said Oliver Goodenough, director of the Center for Legal Innovation at Vermont Law School.

The computer programs, at least initially, have the ability to relieve overburdened courts of small-claims cases, traffic fines and some family law matters. But Goodenough and other experts envision a future in which even more complicated disputes are resolved online, and they say San Jose, California-based Modria has gone far in developing software to realize that.

“There is a version of the future when computers get so good that we trust them to play this role in our society, and it lets us get justice to more people because it’s cheaper and more transparent,” said Colin Rule, Modria’s co-founder.

Ohio officials are using Modria software to resolve disputes over tax assessments and keep them out of court, and a New York-based arbitration association has deployed it to settle medical claims arising from car crashes.

In the Netherlands, Modria software is being used to guide people through their divorces.

The program walks couples through more than two dozen questions, including how they want to co-parent any children they have. It suggests values for spousal support and notes areas of agreement. A second module allows them to negotiate areas of disagreement. If they reach a resolution, they can print up divorce papers that are then reviewed by an attorney to make sure neither side is giving away too much before they are filed in court.

Modria’s founders initially developed their software to help eBay and PayPal solve customer complaints about damaged goods or late deliveries without employing teams of customer service representatives. At eBay, Rule said his system was resolving 60 million disputes a year.

He co-founded Modria in 2011. Although the company’s focus is on selling its technology to e-commerce businesses, Rule said he is passionate about deploying it to courts.

A Michigan company, Court Innovations, is using similar technology to resolve traffic disputes. In four court districts in the state, people ticketed on suspicion of running a red light or speeding can go online and provide an explanation in hopes of getting the ticket thrown out or a lower fine. Prosecutors review the information and make a decision that can be transmitted electronically to the alleged scofflaw for acceptance or rejection, said MJ Cartwright, the company’s CEO.

“When you’re online, there’s a lot you don’t know about that person such as their race and other things that can cloud the decision-making process,” she said.

Technology such as Modria’s can provide legal support to people and businesses that have written off lawyers and the court system as too expensive and tedious and would otherwise try to resolve their disputes on their own, said Larry Bridgesmith, a law professor at Vanderbilt Law School in Tennessee who focuses on dispute resolution strategies.

“If lawyers begin to understand that those are tools they can use to lower the costs of entry into the legal system ... they can get back in the business of serving clients who are presently not served,” he said.